Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd (in liquidation)

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-305–02 OF 2020
RAVINTHRAN, HASHIM HAMZAH AND LIM CHONG FONG JJCA
7 DECEMBER 2023

Companies and Corporations — Members' rights — Locus standi — Suit on company's behalf — Bankrupt contributory filed suit on behalf of company — Whether bankrupt contributory had been empowered by wound up company to commence suit — Whether company had locus standi to maintain suit — Companies Act 1965 (repealed) s 236(2)(a) — Companies Act 2016 s 486(1)(a) — Insolvency Act 1967 s 38(1)(a) & (d)

Contract — Sale and purchase of property — Termination — Respondent agreed to sell property to appellant — Respondent gave vacant possession to appellant before execution of sale and purchase agreement — Appellant was not required to pay rental but required to pay quit rent, assessment, utilities, and other charges on land — Respondent unable to complete agreement — Respondent claimed for vacant possession and rental — Whether respondent had terminated agreement — Whether termination of agreement by respondent was a constructive repudiatory breach of contract — Whether appellant entitled to damages — Whether respondent entitled to vacant possession and payment of rental — Whether appellant had been unjustly enriched — Whether appellant should pay quit rent, assessment, utilities, and other charges on land — Whether appellant's private caveat ought to be removed — Whether appellant's counterclaim for loss of use of land proven

The respondent had purchased 4 acres of land with a first option to purchase the remaining 6.2 acres of land in Klang, Selangor ('the land') from PNSB Properties Sdn Bhd ('PNSB'). Via a discussion between the respondent and the appellant, as could be seen in the respondent's solicitor's letter dated 12 February 2010 ('the agreement'), the appellant agreed to purchase the said land with the property thereon ('the property') from the respondent. For this purpose, the appellant had paid the initial deposits amounting to RM720,000 to the respondent and thereupon the appellant took vacant possession of the property. The respondent then proposed new terms whereby the sale was only for 4 acres of the land without the option to purchase the remaining 6.2 acres of the land and that the appellant was required to pay quit rent and assessment on the property, but the appellant affirmed its intention to purchase the whole land. The respondent could not sell the remaining 6.2 acres of the land because

PNSB had withdrawn the offer to sell the said remaining land. The respondent had requested instruction from the appellant with regards to this issue but there was no unequivocal response from the appellant. The respondent then informed the appellant that rental for the property would be imposed retrospectively commencing April 2012. In the whole event that had transpired, even though there was correspondence between the parties, no sale and purchase agreement was executed between the parties. Subsequently on 1 November 2016, the respondent filed a suit ('the suit') against the appellant claiming, inter alia, vacant possession of the property, payment of rental, return of the initial deposits, removal of private caveat, payment of quit rent and assessment of the property by the appellant, damages, interest, and costs. The appellant on the other hand counterclaimed for loss of use of land, general damages, interest and costs. The appellant initially applied to strike out the suit by reason that it was incompetently brought by the respondent without locus standi because the sanction obtained by the wound up respondent was invalid because the applicant, Devi a/p Suppiah ('Devi') who was a contributory was a bankrupt and hence had no locus standi to apply for sanction for the wound up respondent company. However, the striking out application was dismissed by the High Court and the appeal thereafter was also dismissed by the Court of Appeal. Leave was granted to appeal to the Federal Court, but the Federal Court dismissed the appeal without determining the leave questions posed. Consequently, the suit proceeded to trial and at the end of the trial, the learned High Court judge found in favour of the respondent, hence, the present appeal by the appellant. The appellant divided its appeal into two stages namely: (a) the respondent's locus standi in commencing the suit whereby the critical issue was whether Devi as a bankrupt contributory had been empowered by the wound up respondent to commence the suit against the appellant — with respect to this issue, the respondent argued that this issue of locus standi was caught by the doctrine of res judicata based on the litigation history of the suit; and (b) unjust enrichment benefited by the appellant in not paying rental for the property.

Held, allowing the appeal in part:

(1) The court found that the decisions of the High Court and the Court of Appeal that dismissed the appellant's striking out application and appeal respectively were not final and conclusive on the merits because the suit was not struck out. In other words, the locus standi issue had to be re-determined at trial. Consequently, the court found and held that res judicata had not been attracted on this locus standi issue. With regard to the High Court's decision to summarily dismissed the locus standi issue as unpleaded issue, the court in the present appeal opined that locus standi was a point of law that needed not mandatorily be pleaded, as such, the court decided to deal with the issue in the present appeal (see paras 33–35).

(2) Section 216(2) of the Companies Act 1965 ('the CA 1965') (now s 438 of the Companies Act 2016 ('the CA 2016')) was irrelevant to the locus standi issue here. The relevant statutory provisions on the locus standi issue here were s 236(2)(a) of the CA 1965 (now s 486(1)(a) of the CA 2016) and s 38(1)(a) and/or (d) of the Insolvency Act 1967. In respect of the former, the liquidator was vested with the power without requiring the authority of the court to bring any legal proceedings in the name and on behalf of the wound up company. Nonetheless the liquidator may sanction a contributory to bring the legal proceeding. As to the latter, the bankrupt contributory shall not in a representative capacity maintain a legal proceeding without the previous sanction of the liquidator or participate in the management of a company without the previous sanction of the liquidator or the court. If there was a conflict or uncertainty between the Companies Act and the Bankruptcy/Insolvency Act on a statutory provision pertaining to a winding up matter, the Companies Act prevailed (see paras 38–39 & 41).

(3) In the present case, Devi had before the bringing of the suit applied and obtained the sanction of the director general of insolvency ('DGI') as if she was an ordinary contributory. She had also twice applied for sanction of the DGI pursuant to s 38(1)(a) of the Insolvency Act 1967 and both applications were granted retrospectively. Considering that s 236 of the CA 1965 should prevail over the Insolvency Act 1967, the previous sanction from the DGI pursuant to s 38(1) of the Insolvency Act 1967 was unnecessary and the sanction which was originally sought by Devi and obtained from the DGI dated 21 October 2016 sufficed notwithstanding it was not so stated in the application for purposes of s 38(1)(a) or (d) Insolvency Act 1967. Consequently, the other two retrospective sanctions obtained by her were surplusages and did not matter that they were not prior or previous sanctions. Further, as per s 38(1)(d) of the Insolvency Act 1967, the sanction of the DGI by reason of Devi's bankruptcy was not even necessary because the acts of instructing solicitor and bringing an action of debt recovery by Devi was consistent with winding up that did not constitute management of the wound up company. Based on these findings, the court found and held that the respondent had locus standi to bring and maintain the suit (see paras 42–44 & 46–49).

(4) It was plain from the agreement that the appellant was entitled to the occupation of the property rent-free throughout the subsistence of the agreement. As such, when the respondent demanded from the appellant the payment of rental of the property, the respondent had disabled itself from completing the agreement. Thus, the agreement was meant to be terminated on 12 September 2012 by the respondent when the respondent served its notice on the appellant requiring payment of rental for the property. However, the appellant, instead of accepting the

constructive repudiatory breach by the respondent and discharge the agreement, had unilaterally chose to affirm and treat the agreement as still subsisting and continued to occupy the property without paying rent. As a matter of law, the appellant in so doing retained its right to sue the respondent for damages. The respondent, however, did not refund the initial deposit to the appellant and did not unequivocally reject the appellant's affirmation by seeking vacant possession of the property forthwith. The court found that the agreement was only terminated forthwith when the respondent commenced the suit on 1 November 2016 (see paras 56, 58–59, 61–63 & 65).

(5) There was no appealable error in relation to the High Court's decision in allowing prayer (i) of the respondent's claim for vacant possession for the 4 acres portion of the land. Regarding prayer (ii) of the respondent's claim for rental of the property, the court opined that the payment of rent of the property should commence from 1 November 2016 (when the agreement was terminated) instead of April 2012 as was ordered by the learned High Court judge. The court was also satisfied that the respondent had satisfactorily met the tenets of unjust enrichment set out in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 (FC). The appellant had since the termination of the agreement been enriched by the occupation of the property at the expense of the respondent without payment of rent and there was no defence thereto. The court was mindful of the appellant's counterclaim for damages due to the respondent's wrongful repudiation of the agreement but that was an independent cross claim which would be dealt separately as a matter of accounting rather than a defence to extinguish liability to make restitution. Consequently, the court found that the appellant was liable to pay rent for the 4 acres portion of the land including the property situated thereon from 1 November 2016 till vacant possession was delivered (see paras 66–70).

(6) In relation to the quantum payable for the rental, the learned High Court judge did not accept either of the rent assessed by the parties' respective expert witnesses but adopted a fair rent pro-rated therefrom. The court was of the view that the approach adopted by the learned High Court judge was arbitrary and hence warranted appellate intervention. With respect to prayer (iii) of the respondent's claim for double rent which was dismissed by the High Court judge and prayer (iv) for damages which the High Court made no order, the court found that these were irrelevant because there were no separate appeals on these by the respondent. Based on these findings, the court set aside the rent of RM120,000 and RM165,000 in prayers (ii) and (iii) of the High Court's judgment. The court ordered that the compensable rent by the appellant to the respondent be reassessed by the High Court with the assistance of a sole court appointed expert valuer to be agreed by the parties, otherwise

appointed by the President of the Royal Institution of Surveyors Malaysia, whose fees shall be jointly paid by the parties (see paras 71–74 & 82).

(7) The court found that the quit rent, assessment, utilities, and other charges on the land ('the charges') were payable by the appellant in consideration of the appellant utilising the property free of rent throughout the subsistence of the agreement. This would not be the case upon termination of the agreement. Consequently, the learned High Court judge erred when he ordered the appellant to pay these charges after the termination of the agreement, hence, appellate intervention was justified. Therefore, the court substituted the High Court's order for the charges to be paid from 1 March 2010 until delivery of vacant possession with an order that the charges to be paid from 1 March 2010 to 1 November 2016 only to be re-assessed by the High Court (see paras 75 & 82).

(8) The learned High Court judge had allowed prayer (vi) of the respondent's claim for contra of the initial deposit paid by the appellant against the respondent's claims. Upon the court's review, this was correct as a matter of accounting as mentioned above. Thus, there was no appealable error here that warranted intervention. With regard to the respondent's claim for the removal of the private caveat and prevention of further entry of private caveat by the appellant respectively which had been allowed by the learned High Court judge, the court noticed that the caveat was still in subsistence at the material time of the filing of the suit. Hence upon review, the court found that there was no appealable error on the part of the learned High Court judge. It was immaterial if the caveat lapsed during the course of the trial of the suit. Further, there was no prejudice that the appellant be prevented from further entry of the private caveat since the agreement had been terminated and the appellant had no longer any caveatable interest in the land (see paras 76–77).

(9) As for the appellant's counterclaim for loss of use of the 6.2 acres of the land that had been dismissed, the court found that the learned High Court judge concluded that this had not been proved. Since the court had found that the respondent had terminated the agreement on 1 November 2016 due to its own disability to honour it in entirety that included the 6.2 acres portion of the land was a constructive repudiatory breach of contract, the appellant was entitled to damages as proved. The court however concurred with the learned High Court judge that the appellant failed to do so by only having its director to make the bald assertion regarding the estimated loss. There was no documentary evidence adduced by the appellant to substantiate that estimated loss which would normally be expected and available in such commercial

undertakings. In the premises, the court found no appealable error that warranted appellate intervention (see paras 78–81).

[Bahasa Malaysia summary

Responden telah membeli 4 ekar tanah dengan pilihan pertama untuk membeli baki 6.2 ekar tanah di Klang, Selangor ('tanah tersebut') daripada PNSB Properties Sdn Bhd ('PNSB'). Melalui perbincangan antara responden dan perayu, seperti yang dapat dilihat dalam surat peguam cara responden bertarikh 12 Februari 2010 ('perjanjian tersebut'), perayu bersetuju untuk membeli tanah tersebut bersama dengan harta di atasnya ('hartanah tersebut') daripada responden. Untuk tujuan ini, perayu telah membayar deposit permulaan berjumlah RM720,000 kepada responden dan selepas itu perayu telah mengambil milikan kosong hartanah tersebut. Responden kemudiannya mencadangkan terma baharu di mana penjualan hanya untuk 4 ekar tanah tanpa pilihan untuk membeli baki 6.2 ekar tanah tersebut dan perayu dikehendaki membayar cukai tanah dan taksiran ke atas hartanah tersebut, tetapi perayu mengesahkan niatnya untuk membeli keseluruhan tanah tersebut. Responden tidak dapat menjual baki 6.2 ekar tanah tersebut kerana PNSB telah menarik balik tawaran untuk menjual baki tanah tersebut. Responden telah meminta arahan daripada perayu berhubung isu ini tetapi tiada jawapan yang jelas daripada perayu. Responden kemudiannya memaklumkan kepada perayu bahawa sewa untuk hartanah tersebut akan dikenakan secara retrospektif mulai April 2012. Dalam keseluruhan kejadian yang berlaku, walaupun terdapat surat-menyurat antara pihak-pihak, tiada perjanjian jual beli telah dimeterai antara pihak-pihak. Seterusnya pada 1 November 2016, responden memfailkan saman ('saman tersebut') terhadap perayu yang menuntut, antara lain, milikan kosong hartanah tersebut, bayaran penyewaan, pemulangan deposit permulaan, penghapusan kaveat persendirian, pembayaran cukai tanah dan taksiran hartanah tersebut oleh perayu, ganti rugi, faedah, dan kos. Perayu sebaliknya menuntut balas bagi kehilangan penggunaan tanah, ganti rugi am, faedah dan kos. Perayu pada mulanya memohon untuk membatalkan saman tersebut dengan alasan bahawa ia dibawa secara tidak kompeten oleh responden tanpa locus standi kerana kebenaran yang diperolehi oleh responden yang digulung adalah tidak sah kerana pemohon, Devi a/p Suppiah ('Devi') yang merupakan penyumbang adalah seorang yang bankrap dan oleh itu tidak mempunyai locus standi untuk memohon kebenaran bagi syarikat responden yang digulung. Bagaimanapun, permohonan pembatalan tersebut telah ditolak oleh Mahkamah Tinggi dan rayuan yang seterusnya juga telah ditolak oleh Mahkamah Rayuan. Kebenaran telah diberikan untuk merayu ke Mahkamah Persekutuan, tetapi Mahkamah Persekutuan menolak rayuan tersebut tanpa menentukan soalan-soalan dalam permohonan kebenaran yang dikemukakan. Akibatnya, saman tersebut diteruskan ke perbicaraan dan pada akhir perbicaraan, hakim Mahkamah Tinggi yang bijaksana mendapati memihak kepada responden, justeru, rayuan semasa oleh perayu. Perayu membahagikan rayuannya kepada dua peringkat

iaitu: (a) locus standi responden dalam memulakan saman tersebut di mana isu kritikal adalah sama ada Devi sebagai penyumbang yang bankrap telah diberi kuasa oleh responden yang digulung untuk memulakan saman terhadap perayu — berkenaan dengan isu ini, responden berhujah bahawa isu locus standi ini dihalang oleh doktrin res judicata berdasarkan sejarah litigasi saman tersebut; dan (b) pengayaan yang tidak adil yang diterima oleh perayu apabila tidak membayar sewa bagi hartanah tersebut.

Diputuskan, membenarkan sebahagian rayuan:

(1) Mahkamah mendapati bahawa keputusan Mahkamah Tinggi dan Mahkamah Rayuan yang masing-masing menolak permohonan pembatalan dan rayuan perayu bukanlah terakhir dan muktamad atas merit kerana saman tersebut tidak dibatalkan. Dalam erti kata lain, isu locus standi perlu ditentukan semula semasa perbicaraan. Akibatnya, mahkamah mendapati dan memutuskan bahawa res judicata tidak terpakai dalam isu locus standi ini. Berkenaan dengan keputusan Mahkamah Tinggi yang menolak secara terus isu locus standi sebagai isu yang tidak diplid, mahkamah dalam rayuan semasa berpendapat bahawa locus standi adalah perkara undang-undang yang tidak perlu diplid secara mandatori, oleh itu, mahkamah memutuskan untuk menangani isu tersebut dalam rayuan semasa (lihat perenggan 33–35).

(2) Seksyen 216(2) Akta Syarikat 1965 ('AS 1965') (kini s 438 Akta Syarikat 2016 ('AS 2016')) tidak relevan dengan isu locus standi di sini. Peruntukan berkanun yang relevan dengan isu locus standi di sini ialah s 236(2)(a) AS 1965 (kini s 486(1)(a) AS 2016) dan s 38(1)(a) dan/atau (d) Akta Insolvensi 1967. Berkenaan dengan yang pertama, penyelesai diberi kuasa tanpa memerlukan kebenaran mahkamah untuk membawa apa-apa prosiding undang-undang atas nama dan bagi pihak syarikat yang digulung. Walau bagaimanapun penyelesai boleh membenarkan penyumbang untuk membawa prosiding undang-undang. Bagi yang terakhir, penyumbang yang bankrap tidak boleh dalam kapasiti perwakilan mengekalkan prosiding undang-undang tanpa kebenaran awal daripada penyelesai atau mengambil bahagian dalam pengurusan syarikat tanpa kebenaran awal penyelesai atau mahkamah. Jika terdapat percanggahan atau ketidakpastian antara Akta Syarikat dan Akta Kebankrapan/Insolvensi mengenai peruntukan berkanun yang berkaitan dengan perkara penggulungan, Akta Syarikat yang akan diguna pakai (lihat perenggan 38–39 & 41).

(3) Dalam kes ini, Devi sebelum membawa saman tersebut telah memohon dan mendapat kebenaran ketua pengarah insolvensi ('DGI') seolah-olah dia adalah seorang penyumbang biasa. Beliau juga telah dua kali memohon untuk mendapatkan kebenaran daripada DGI menurut s 38(1)(a) Akta Insolvensi 1967 dan kedua-dua permohonan tersebut

telah diluluskan secara retrospektif. Memandangkan s 236 AS 1965 sepatutnya mengatasi Akta Insolvensi 1967, kebenaran awal daripada DGI menurut s 38(1) Akta Insolvensi 1967 adalah tidak perlu dan kebenaran yang pada asalnya dimohon oleh Devi dan diperoleh daripada DGI bertarikh 21 Oktober 2016 sudah memadai walaupun tidak dinyatakan dalam permohonan tersebut bahawa ia adalah bagi maksud s 38(1)(a) atau (d) Akta Insolvensi 1967. Akibatnya, dua kebenaran retrospektif tersebut yang diperoleh olehnya adalah lebihan dan tidak menjadi isu bahawa ianya bukan kebenaran awal atau sebelumnya. Tambahan pula, mengikut s 38(1)(d) Akta Insolvensi 1967, kebenaran DGI atas sebab kebankrapan Devi tidak diperlukan kerana tindakan mengarahkan peguam cara dan membawa tindakan pemulihan hutang oleh Devi adalah konsisten dengan penggulungan yang tidak membentuk pengurusan syarikat yang digulung. Berdasarkan penemuan ini, mahkamah mendapati dan memutuskan bahawa responden mempunyai locus standi untuk membawa dan mengekalkan saman tersebut (lihat perenggan 42–44 & 46–49).

(4) Adalah jelas daripada perjanjian tersebut bahawa perayu berhak untuk menduduki hartanah tersebut tanpa sewa sepanjang tempoh perjanjian. Oleh yang demikian, apabila responden menuntut daripada perayu pembayaran sewa hartanah tersebut, responden telah menyekat dirinya daripada menyempurnakan perjanjian tersebut. Oleh itu, perjanjian tersebut dimaksudkan untuk ditamatkan pada 12 September 2012 oleh responden apabila responden menyampaikan notisnya kepada perayu yang menetapkan pembayaran sewa untuk hartanah tersebut. Walau bagaimanapun, perayu tidak menerima pelanggaran penolakan secara konstruktif tersebut oleh responden dan melepaskan perjanjian tersebut, sebaliknya dia secara unilateral memilih untuk mengesahkan dan menganggap perjanjian tersebut masih wujud dan terus menduduki hartanah tersebut tanpa membayar sewa. Dari segi undang-undang, perayu dengan berbuat demikian mengekalkan haknya untuk menyaman responden untuk ganti rugi. Responden, walau bagaimanapun, tidak memulangkan deposit permulaan kepada perayu dan tidak menolak dengan tegas pengesahan perayu dengan mendapatkan milikan kosong hartanah tersebut dengan segera. Mahkamah mendapati bahawa perjanjian tersebut hanya ditamatkan serta-merta apabila responden memulakan saman pada 1 November 2016 (lihat perenggan 56, 58–59, 61–63 & 65).

(5) Tiada kekhilafan yang boleh dirayu berhubung dengan keputusan Mahkamah Tinggi dalam membenarkan permohonan (i) tuntutan responden untuk milikan kosong bagi bahagian tanah seluas 4 ekar. Berkenaan permohonan (ii) tuntutan responden untuk bayaran penyewaan hartanah tersebut, mahkamah berpendapat bahawa pembayaran sewa hartanah tersebut hendaklah bermula dari 1

November 2016 (apabila perjanjian ditamatkan) dan bukannya April 2012 seperti yang diperintahkan oleh hakim Mahkamah Tinggi yang bijaksana. Mahkamah juga berpuas hati bahawa responden telah memenuhi prinsip pengayaan yang tidak adil yang dinyatakan dalam *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 (MP). Perayu telah sejak penamatan perjanjian tersebut diperkayakan dengan pendudukan hartanah tersebut atas perbelanjaan responden tanpa bayaran sewa dan tiada pembelaan terhadap perkara tersebut. Mahkamah mengambil berat tentang tuntutan balas perayu untuk ganti rugi disebabkan oleh penolakan salah responden terhadap perjanjian tersebut tetapi itu adalah tuntutan silang berasingan yang akan diuruskan secara berasingan sebagai soal perakaunan dan bukannya pembelaan untuk menghapuskan liabiliti untuk membuat pengembalian. Oleh itu, mahkamah mendapati bahawa perayu bertanggungjawab membayar sewa bagi bahagian tanah seluas 4 ekar tersebut termasuk harta yang terletak di atasnya dari 1 November 2016 sehingga milikan kosong diserahkan (lihat perenggan 66–70).

(6) Berkaitan dengan kuantum yang perlu dibayar untuk sewa, hakim Mahkamah Tinggi yang bijaksana tidak menerima mana-mana sewa yang dinilai oleh saksi-saksi pakar pihak-pihak tetapi menerima pakai sewa yang adil secara prorata daripadanya. Mahkamah berpendapat bahawa pendekatan yang diguna pakai oleh hakim Mahkamah Tinggi yang bijaksana adalah secara sembarangan dan oleh itu memerlukan campur tangan rayuan. Berkenaan dengan permohonan (iii) tuntutan responden untuk sewa dua kali ganda yang telah ditolak oleh hakim Mahkamah Tinggi dan permohonan (iv) untuk ganti rugi yang tidak dibuat oleh Mahkamah Tinggi, mahkamah mendapati bahawa ini tidak relevan kerana tiada rayuan yang berasingan mengenai perkara-perkara ini oleh responden. Berdasarkan dapatan-dapatan ini, mahkamah mengenepikan sewa RM120,000 dan RM165,000 dalam permohonan (ii) dan (iii) penghakiman Mahkamah Tinggi. Mahkamah memerintahkan supaya sewa yang perlu dibayar oleh perayu kepada responden dinilai semula oleh Mahkamah Tinggi dengan bantuan penilai pakar tunggal yang dilantik oleh mahkamah yang dipersetujui oleh pihak-pihak, jika tidak dilantik oleh Presiden Pertubuhan Juruukur Diraja Malaysia, yang mana yurannya hendaklah dibayar secara bersama oleh pihak-pihak (lihat perenggan 71–74 & 82).

(7) Mahkamah mendapati bahawa cukai tanah, taksiran, utiliti, dan caj-caj lain ke atas tanah tersebut ('caj-caj tersebut') perlu dibayar oleh perayu sebagai balasan perayu menggunakan hartanah tersebut tanpa membayar sewa sepanjang tempoh perjanjian tersebut. Ini tidak akan berlaku apabila perjanjian tersebut ditamatkan. Akibatnya, hakim Mahkamah Tinggi yang bijaksana telah terkhilaf apabila mengarahkan perayu membayar caj-caj ini selepas penamatan perjanjian tersebut, justeru

campur tangan rayuan adalah wajar. Oleh itu, mahkamah menggantikan perintah Mahkamah Tinggi supaya caj-caj tersebut dibayar mulai 1 Mac 2010 sehingga penyerahan milikan kosong dengan perintah supaya caj-caj tersebut dibayar mulai 1 Mac 2010 hingga 1 November 2016 sahaja untuk dinilai semula oleh Mahkamah Tinggi (lihat perenggan 75 & 82).

(8) Hakim Mahkamah Tinggi yang bijaksana telah membenarkan permohonan (vi) tuntutan responden untuk kontra deposit permulaan yang dibayar oleh perayu terhadap tuntutan responden. Selepas semakan mahkamah, ini adalah betul dari segi perakaunan seperti yang dinyatakan di atas. Oleh itu, tiada kekhilafan yang boleh dirayu di sini yang memerlukan campur tangan. Berkenaan dengan tuntutan responden untuk penghapusan kaveat persendirian dan halangan kemasukan lanjut kaveat persendirian oleh perayu yang masing-masing telah dibenarkan oleh hakim Mahkamah Tinggi yang bijaksana, mahkamah mendapati bahawa kaveat tersebut masih wujud pada masa yang material semasa pemfailan saman tersebut. Oleh itu, selepas semakan, mahkamah mendapati bahawa tiada kekhilafan yang boleh dirayu di pihak hakim Mahkamah Tinggi yang bijaksana. Adalah tidak penting jika kaveat tersebut sudah luput semasa perbicaraan saman tersebut. Selanjutnya, tiada prejudis jika perayu dihalang daripada memasukkan kaveat persendirian lanjutan memandangkan perjanjian tersebut telah ditamatkan dan perayu tidak lagi mempunyai apa-apa kepentingan berkaveat dalam tanah tersebut (lihat perenggan 76–77).

(9) Bagi tuntutan balas perayu untuk kehilangan penggunaan tanah seluas 6.2 ekar yang telah ditolak, mahkamah mendapati hakim Mahkamah Tinggi yang bijaksana membuat kesimpulan bahawa ini tidak dibuktikan. Memandangkan mahkamah mendapati bahawa responden telah menamatkan perjanjian tersebut pada 1 November 2016 kerana ketidakupayaannya sendiri untuk memenuhinya secara keseluruhan iaitu termasuk bahagian tanah seluas 6.2 ekar tersebut adalah pelanggaran kontrak penolakan yang konstruktif, perayu berhak mendapat ganti rugi seperti yang dibuktikan. Mahkamah bagaimanapun bersetuju dengan hakim Mahkamah Tinggi yang bijaksana bahawa perayu gagal berbuat demikian dengan hanya meminta pengarahnya membuat kenyataan tanpa bukti berhubung dengan anggaran kerugian. Tiada keterangan dokumentari dikemukakan oleh perayu untuk mengesahkan anggaran kerugian tersebut yang biasanya dijangka dan boleh didapati dalam aku janji komersial tersebut. Berdasarkan dapatan-dapatan tersebut, mahkamah mendapati tiada kekhilafan yang boleh dirayu yang memerlukan campur tangan rayuan (lihat perenggan 78–81).]

Cases referred to

Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal [2018] 2 MLJ 537, FC (refd)

Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd [2007] 5 MLJ 697, FC (refd)

Asian Shield Warehousing Sdn Bhd v Leopad Holdings Sdn Bhd [2018] MLJU 1827; [2018] 1 LNS 1981, HC (refd)

Cape Breton Company, In re (1881) 19 Ch D 77, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441, FC (refd)

Foo Fatt Chuen v Jacobson Cheong Weng Hin & Ors [2012] 8 MLJ 522; [2012] 3 CLJ 632, HC (refd)

Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)

Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd [1970] 1 QB 447, CA (refd)

Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd [2013] 1 MLJ 406; [2012] 10 CLJ 88, CA (refd)

Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor [1999] 1 MLJ 193, FC (refd)

Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd [2020] 5 MLJ 614; [2020] 9 CLJ 449, FC (refd)

Lai Cheng Ooi (the executrix of the estate of Lee Tain Tshung @ Kee Thien Chiung, deceased) v Naslei Enterprise Sdn Bhd (receivers appointed [2015] 10 CLJ 409, HC (refd)

Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd [2020] MLJU 790; [2020] 1 LNS 697, HC (refd)

Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd and another appeal [2021] 2 MLJ 424; [2021] 1 CLJ 328, CA (refd)

Oakwell Engineering International Pte Ltd v PCM Feam (M) Sdn Bhd [2014] 11 MLJ 175, HC (refd)

Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd [2012] 4 MLJ 149; [2012] 1 LNS 1416, CA (refd)

Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case [2022] 12 MLJ 247, HC (distd)

Tan Hock Chan v Kho Teck Seng [1980] 1 MLJ 308, FC (refd)

Winstech Engineering Sdn Bhd v ESPL (M) Sdn Bhd [2014] 3 MLJ 1, FC (folld)

Wolverhampton Steel & Iron Co Ltd and others, Re [1977] 3 All ER 467, CA (refd)

Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd) [2010] 2 MLJ 749; [2010] 3 CLJ 785, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) ss 216(2), 236, 236(2)
Companies Act 2016 ss 438, 486, 486(1)(a)
Insolvency Act 1967 ss 8(1)(b), 38(1), (1)(a), (1)(d)

Appeal from: *Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd* [2020] MLJU 790 (High Court, Shah Alam)

Alex De Silva (with Joshua Lawson Cowie) (Bodipalar Ponnudurai De Silva) for the appellant.
Ravichandran Subramaniam (with Elaina Teng and Eizlan Farhan Nakhrowi) (Seah Balan Ravin & Co) for the respondent.

Lim Chong Fong JCA:

INTRODUCTION

[1] This is an after-trial appeal pertaining to a botched land sale transaction.

[2] The appellant/defendant and respondent/plaintiff are both companies incorporated pursuant to the Companies Act 1965. However, the respondent was wound up on 1 March 2013 and the Official Receiver (now Director-General of Insolvency ('DGI')) was appointed as the liquidator.

BACKGROUND

[3] On 21 December 2005, the respondent purchased by way of lease 4 acres with a first option to purchase the balance 6.2 acres of 10.2 acres of land registered as HS(D) 1164005, PT No 231, Bandar Sultan Suleiman, Daerah Klang, Selangor ('land') from PNSB Properties Sdn Bhd ('PNSB').

[4] The aforesaid 4 acres portion of the land has a warehouse and two-storey office built thereon ('property').

[5] Pursuant to a discussion between the parties on or about 12 February 2010, the appellant agreed to purchase the land with the property thereon from the respondent at the price of RM24m ('purchase price').

[6] This discussion was confirmed by the respondent's solicitors, Messrs Ariffin Raj de Silva vide its letter dated 12 February 2010 ('agreement') which, amongst others, include:

(a) the sale of the land is subject to the approval of the relevant authority;

A (b) the payment of 3% of the purchase price as earnest deposit ('earnest deposit') and the balance 7% of the purchase price (collectively 'initial deposit') must be paid when the sale and purchase agreement is signed to complete the initial deposit payment;

B (c) the sale and purchase agreement must be signed within 14 days of obtaining the State Authority's approval;

(d) the balance of the purchase price must be paid within three months and an additional one month from the signing of the sale and purchase agreement; and

C (e) after the payment of the 10% initial deposit, the appellant will be given vacant possession of the property. The appellant must may rent for occupying the property if the purchase of the land is aborted.

D [7] It is gainful to reproduce the aforesaid letter:

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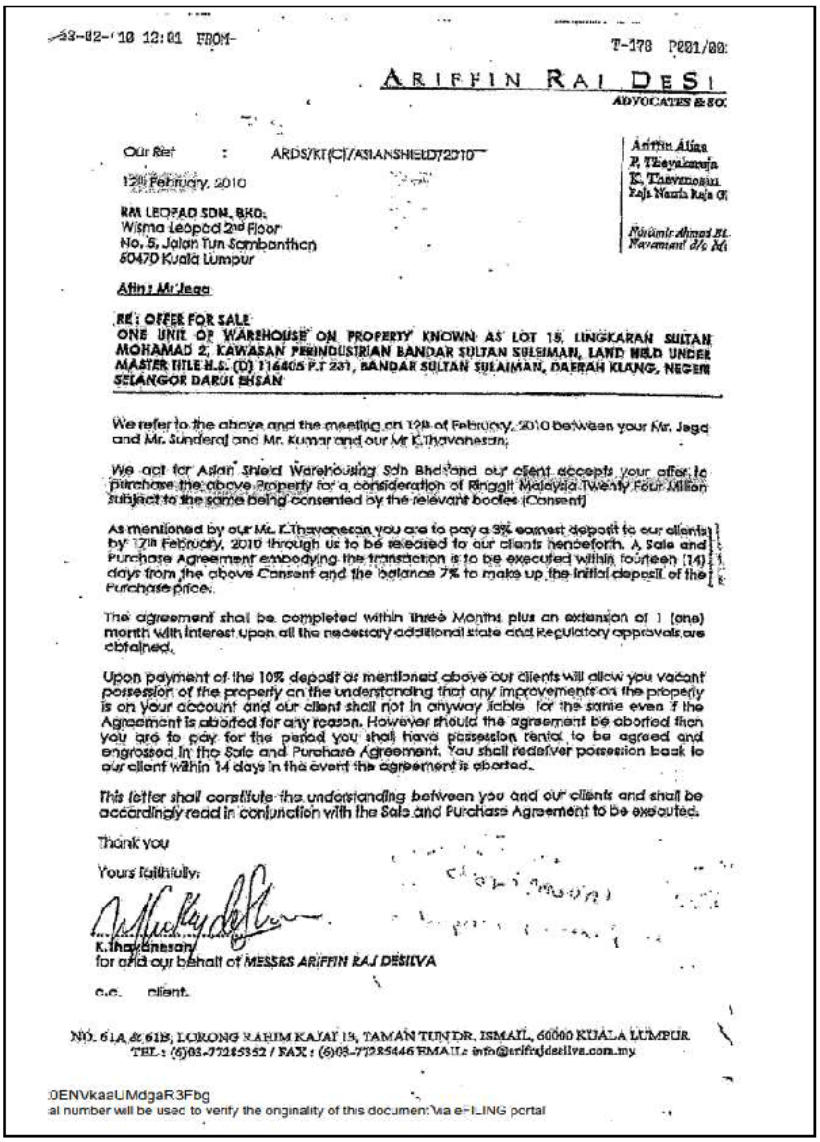

12-02-'10 12:01 FROM- T-178 P001/00:

ARIFFIN RAJ DESI
ADVOCATES & SO

Our Ref : ARDS/KT(C)/ASIANSHIELD72010

12th February, 2010

RM LEOPAD SDN. BHD.
Wisma Leopad 2nd Floor
No. 5, Jalan Tun Sambanthan
50470 Kuala Lumpur

Attn: Mr Jega

RE: OFFER FOR SALE
ONE UNIT OF WAREHOUSE ON PROPERTY KNOWN AS LOT 18, LINGKARAN SULTAN MOHAMAD 2, KAWASAN PERINDUSTRIAN BANDAR SULTAN SULEIMAN, LAND HELD UNDER MASTER TITLE H.S. (D) 116405 P.T 231, BANDAR SULTAN SULAIMAN, DAERAH KLANG, NEGERI SELANGOR DARUL EHSAN

We refer to the above and the meeting on 12th of February, 2010 between your Mr. Jega and Mr. Sundera] and Mr. Kumar and our Mr K.Thavanesan.

We act for Asian Shield Warehousing Sdn Bhd and our client accepts your offer to purchase the above Property for a consideration of Ringgit Malaysia Twenty Four Million subject to the same being consented by the relevant bodies (Consent)

As mentioned by our Mr. K.Thavanesan you are to pay a 3% earnest deposit to our clients by 17th February, 2010 through us to be released to our clients henceforth. A Sale and Purchase Agreement embodying the transaction is to be executed within fourteen (14) days from the above Consent and the balance 7% to make up the initial deposit of the Purchase price.

The agreement shall be completed within three Months plus an extension of 1 (one) month with interest upon all the necessary additional state and Regulatory approvals are obtained.

Upon payment of the 10% deposit as mentioned above our clients will allow you vacant possession of the property on the understanding that any improvements on the property is on your account and our client shall not in anyway liable for the same even if the Agreement is aborted for any reason. However should the agreement be aborted then you are to pay for the period you shall have possession rental to be agreed and engrossed in the Sale and Purchase Agreement. You shall redeliver possession back to our client within 14 days in the event the agreement is aborted.

This letter shall constitute the understanding between you and our clients and shall be accordingly read in conjunction with the Sale and Purchase Agreement to be executed.

Thank you

Yours faithfully,

K.Thavanesan
for and on behalf of MESSRS ARIFFIN RAJ DESILVA

c.c. client.

NO. 61A & 61B, LORONG RAHIM KAJAI 15, TAMAN TUN DR. ISMAIL, 60000 KUALA LUMPUR
TEL : (6)03-77285352 / FAX : (6)03-77285446 EMAIL : info@ariffrajdesilva.com.my

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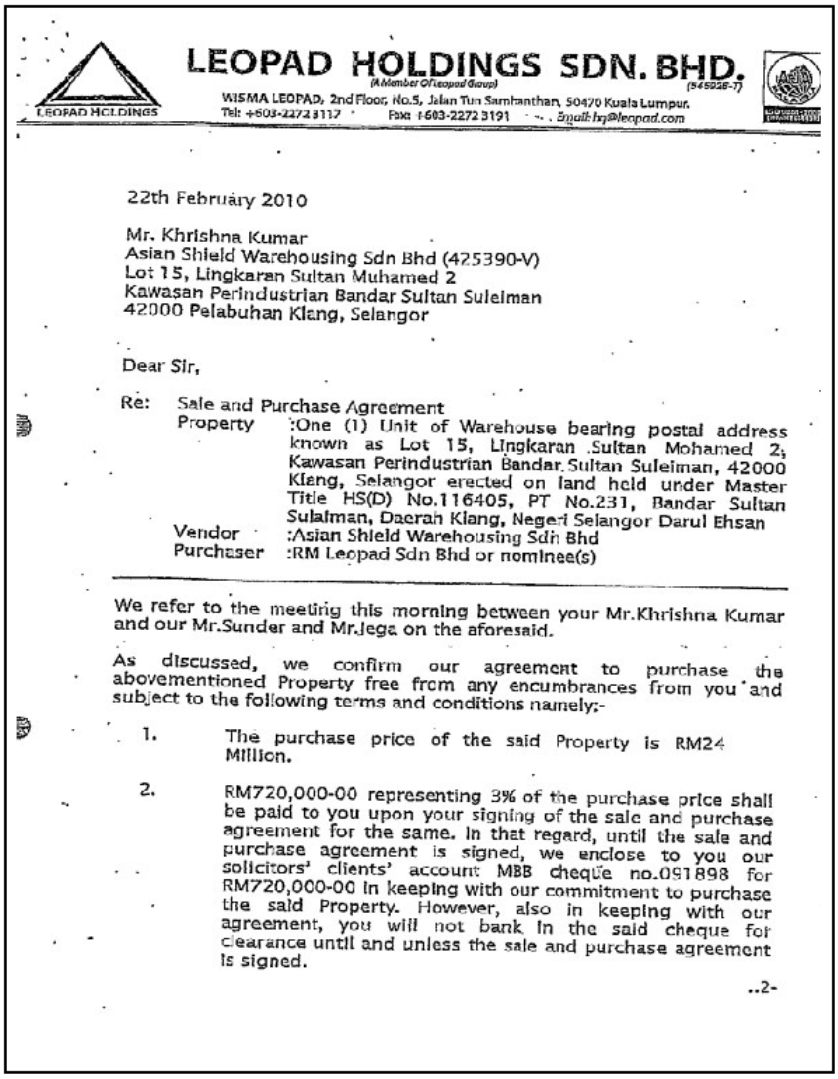
[8] There were subsequently further negotiations between the parties wherein the appellant paid the respondent the 3% earnest deposit sum of RM720,000.

[9] The respondent thereafter via a letter dated 1 March 2010 to the appellant, inter alia, confirmed the receipt of the cheque for RM720,000 earnest deposit payment pursuant to the agreement and again stated that the appellant would be given vacant possession of the property pending the execution of the sale and purchase agreement. It is also stated that all utilities and rates were to be borne by the appellant from the date when vacant possession is given. Again, it is gainful to reproduce the aforesaid letter:



LEOPAD HOLDINGS SDN. BHD.
(A Member Of Leopad Group) (945926-T)
WISMA LEOPAD, 2nd Floor, No.5, Jalan Tun Sambanthan, 50470 Kuala Lumpur.
Tel: +603-22723117 Fax: +603-22723191 Email: hq@leopad.com

22th February 2010

Mr. Khrishna Kumar
Asian Shield Warehousing Sdn Bhd (425390-V)
Lot 15, Lingkaran Sultan Muhamed 2
Kawasan Perindustrian Bandar Sultan Suleiman
42000 Pelabuhan Klang, Selangor

Dear Sir,

Re: Sale and Purchase Agreement
Property :One (1) Unit of Warehouse bearing postal address known as Lot 15, Lingkaran Sultan Mohamed 2, Kawasan Perindustrian Bandar Sultan Suleiman, 42000 Klang, Selangor erected on land held under Master Title HS(D) No.116405, PT No.231, Bandar Sultan Sulaiman, Daerah Klang, Negeri Selangor Darul Ehsan
Vendor :Asian Shield Warehousing Sdn Bhd
Purchaser :RM Leopad Sdn Bhd or nominee(s)

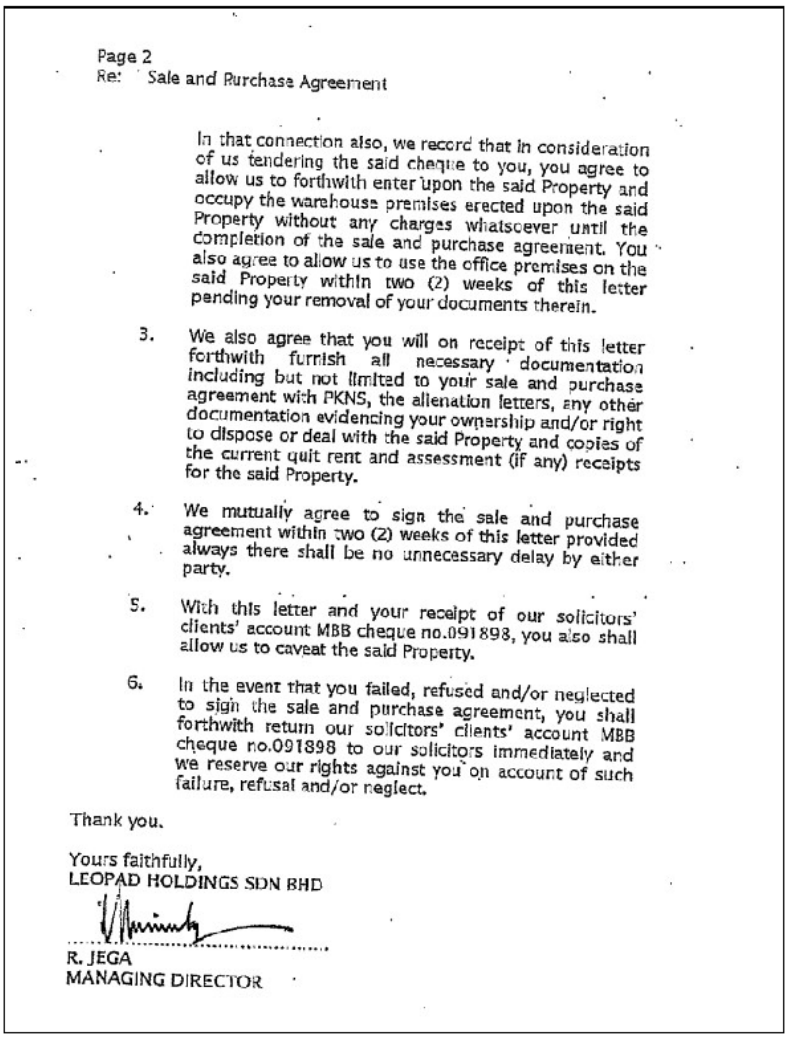
We refer to the meeting this morning between your Mr.Khrishna Kumar and our Mr.Sunder and Mr.Jega on the aforesaid.

As discussed, we confirm our agreement to purchase the abovementioned Property free from any encumbrances from you and subject to the following terms and conditions namely:-

1. The purchase price of the said Property is RM24 Million.

2. RM720,000-00 representing 3% of the purchase price shall be paid to you upon your signing of the sale and purchase agreement for the same. In that regard, until the sale and purchase agreement is signed, we enclose to you our solicitors' clients' account MBB cheque no.091898 for RM720,000-00 in keeping with our commitment to purchase the said Property. However, also in keeping with our agreement, you will not bank in the said cheque for clearance until and unless the sale and purchase agreement is signed.

..2-



Page 2
Re: Sale and Purchase Agreement

In that connection also, we record that in consideration of us tendering the said cheque to you, you agree to allow us to forthwith enter upon the said Property and occupy the warehouse premises erected upon the said Property without any charges whatsoever until the completion of the sale and purchase agreement. You also agree to allow us to use the office premises on the said Property within two (2) weeks of this letter pending your removal of your documents therein.

3. We also agree that you will on receipt of this letter forthwith furnish all necessary documentation including but not limited to your sale and purchase agreement with PKNS, the alienation letters, any other documentation evidencing your ownership and/or right to dispose or deal with the said Property and copies of the current quit rent and assessment (if any) receipts for the said Property.

4. We mutually agree to sign the sale and purchase agreement within two (2) weeks of this letter provided always there shall be no unnecessary delay by either party.

5. With this letter and your receipt of our solicitors' clients' account MBB cheque no.091898, you also shall allow us to caveat the said Property.

6. In the event that you failed, refused and/or neglected to sign the sale and purchase agreement, you shall forthwith return our solicitors' clients' account MBB cheque no.091898 to our solicitors immediately and we reserve our rights against you on account of such failure, refusal and/or neglect.

Thank you.

Yours faithfully,
LEOPAD HOLDINGS SDN BHD

R. JEGA
MANAGING DIRECTOR

[10] The appellant then took vacant possession of the property on 1 March 2010.

[11] However, by a letter dated 26 January 2011, the respondent's new solicitors, Messrs A Farah Zabir & Partners informed the appellant that the sale and purchase of the land with the property had stalled and proposed the following terms:

(a) the sale is only for 4 acres portion of the land with the property but does not include the option to purchase the remaining 6.2 acres of the land;

(b) the purchase price be reduced to RM17m from RM24m;

(c) since the appellant had occupied the property without payment of any rental from 2010, the appellant shall be liable to pay quit rent and assessment on the property; and

(d) the respondent's solicitors are to forward a draft sale and purchase agreement within three weeks from the date of acceptance of the revised offer.

[12] This was due to financial difficulties faced by the respondent vis a vis SME Bank by reason of the loan taken to purchase the 4 acres portion of the land. As the result, this affected the ability of the respondent to conclude the purchase of the balance 6.2 acres portion of the land from PNSB.

[13] However, the appellant vide its solicitor Messrs Paul Ong & Associates' letter dated 11 April 2011 replied still affirming the appellant's intention to purchase the whole 10.2 acres of the land.

[14] Thereafter pursuant to several further discussions between the parties, the respondent vide its solicitors' letter dated 21 June 2011 further proposed that the purchase price be reduced to RM15.5m for the 4 acres portion of the land only and rental will be imposed upon the execution of the sale and purchase agreement.

[15] However due to issues that have arisen between the respondent and PNSB, the respondent vide its solicitors on 17 April 2012 informed the appellant's solicitors that PNSB had withdrawn the offer to sell the remaining 6.2 acres portion of the land and requested for further instructions from the appellant. It is gainful to reproduce the aforesaid letter:

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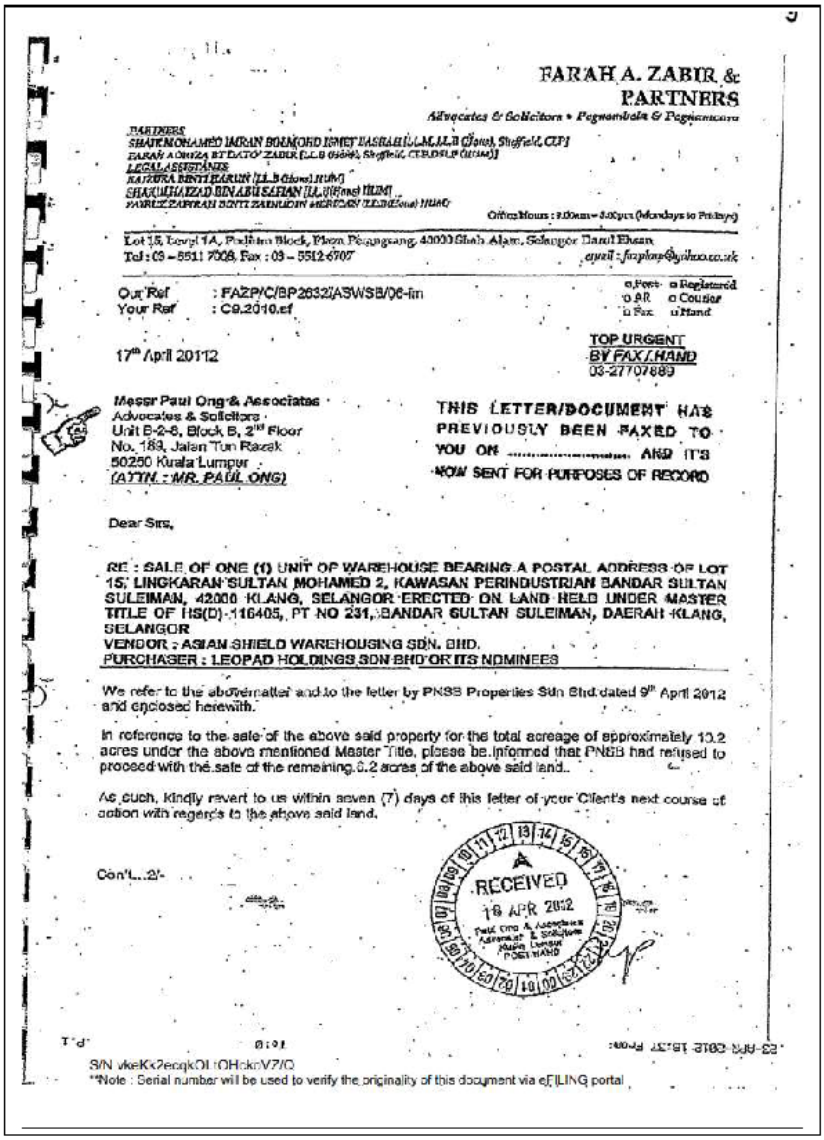

FARAH A. ZABIR &
PARTNERS
Advocates & Solicitors • Pegumahkim & Pegumacara

PARTNERS
SHAIK MOHAMED IMRAN BOKHORD ISMET FARAH [LL.M, LL.B (Hons), Sheffield, CLP]
FARAH A ONIZA BT DATO' ZABIR [LL.B (Hons), Sheffield, CTR, DSLP (Distinction)]
LEGAL ASSISTANCE
KATHERA BINTI HARUN [LL.B (Hons) IIUM]
SHAIK HUZAID BIN ABU SAFIAN [LL.B (Hons) IIUM]
FAIRUZ ZAHRAN BINTI ZAINUDIN HERMAN [LL.B (Hons) IIUM]

Office Hours : 9.00am – 5.00pm (Mondays to Fridays)

Lot 15, Level 1A, Perkhidmatan Block, Plaza Pengurusan, 40000 Shah Alam, Selangor Darul Ehsan
Tel : 03 – 5511 7008, Fax : 03 – 5512 6707 email : farahza@yahoo.co.uk

Our Ref : FAZP/C/BP2632/ASWSB/06-lm
Your Ref : C9.2010.ef

o Fax o Registered o AR o Courier o Hand

17th April 2012

TOP URGENT
BY FAX / HAND
03-27707889

Messr Paul Ong & Associates
Advocates & Solicitors
Unit B-2-8, Block B, 2nd Floor
No. 183, Jalan Tun Razak
50250 Kuala Lumpur
(ATTN : MR. PAUL ONG)

THIS LETTER/DOCUMENT HAS PREVIOUSLY BEEN FAXED TO YOU ON ..... AND IT'S NOW SENT FOR PURPOSES OF RECORD

Dear Sirs,

RE : SALE OF ONE (1) UNIT OF WAREHOUSE BEARING A POSTAL ADDRESS OF LOT 15, LINGKARAN SULTAN MOHAMED 2, KAWASAN PERINDUSTRIAN BANDAR SULTAN SULEIMAN, 42000 KLANG, SELANGOR ERECTED ON LAND HELD UNDER MASTER TITLE OF HS(D)-116405, PT NO 231, BANDAR SULTAN SULEIMAN, DAERAH KLANG, SELANGOR
VENDOR : ASIAN SHIELD WAREHOUSING SDN. BHD.
PURCHASER : LEOPAD HOLDINGS SDN BHD OR ITS NOMINEES

We refer to the above matter and to the letter by PNSB Properties Sdn Bhd dated 9th April 2012 and enclosed herewith.

In reference to the sale of the above said property for the total acreage of approximately 10.2 acres under the above mentioned Master Title, please be informed that PNSB had refused to proceed with the sale of the remaining 0.2 acres of the above said land.

As such, kindly revert to us within seven (7) days of this letter of your Client's next course of action with regards to the above said land.

Con't...2/-

RECEIVED
18 APR 2012
Farah Onn A. Associates
Advocates & Solicitors
Kuala Lumpur
HAND

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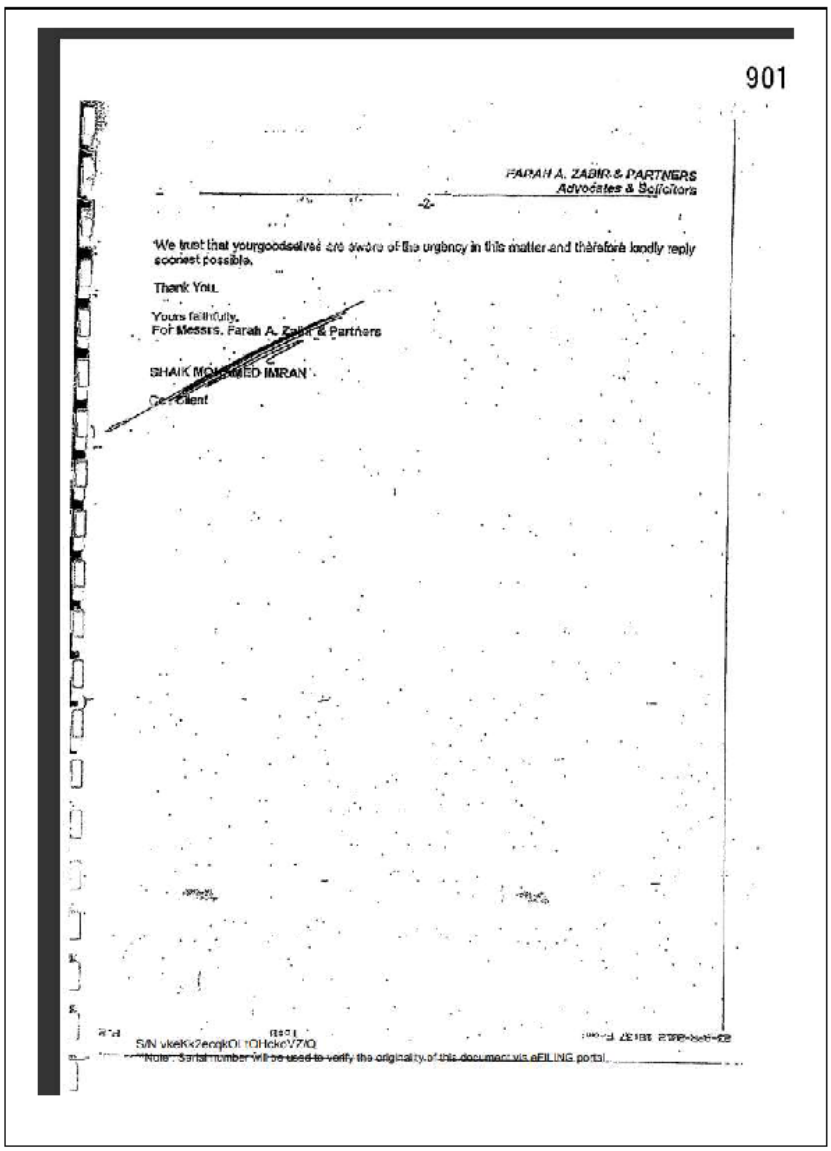
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FARAH A. ZABIR & PARTNERS
Advocates & Solicitors

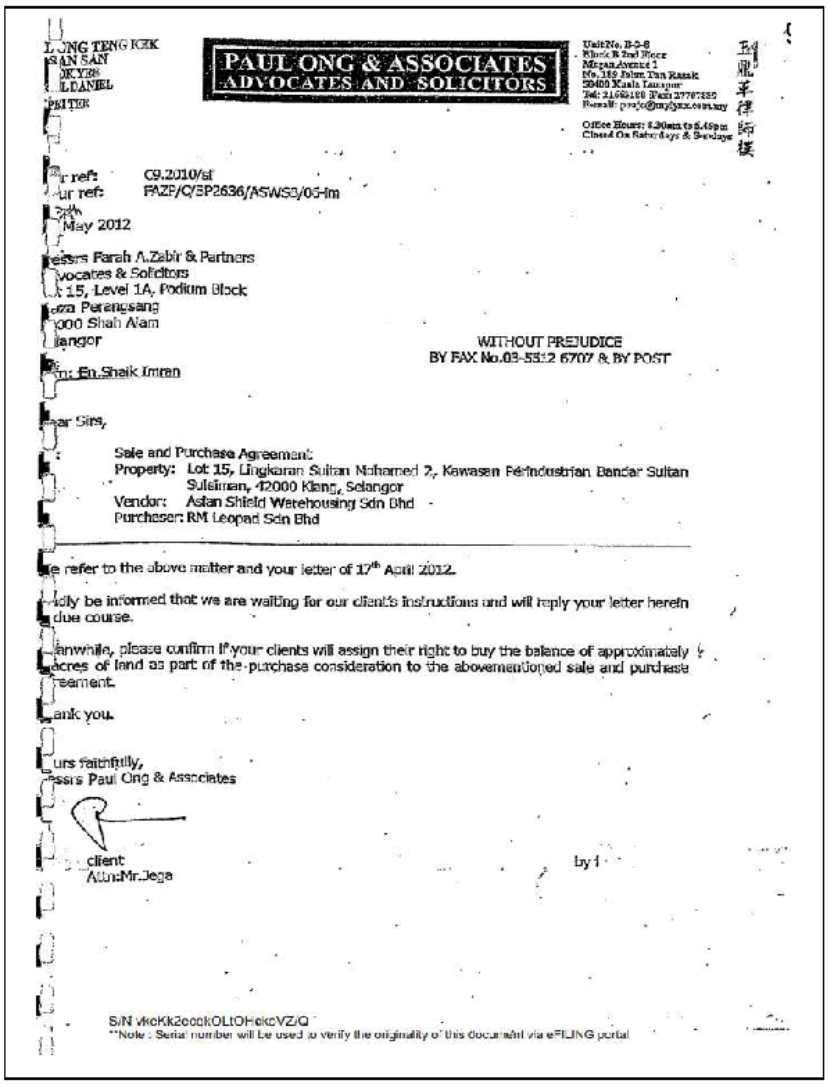
We trust that yourgoodselves are aware of the urgency in this matter and therefore kindly reply soonest possible.

Thank You.

Yours faithfully,
For Messrs. Farah A. Zabir & Partners

SHAIK MOHAMED IMRAN
Our Client

[16] The respondent did not receive any unequivocal response from the appellant as seen in the appellant solicitors' letter dated 7 May 2012 reproduced below:



L ONG TENG KEK
SAN SAN
OK YEE
L DANIEL
PRITER

PAUL ONG & ASSOCIATES
ADVOCATES AND SOLICITORS

Unit No. B-2-8
Block B 2nd Floor
Megan Avenue 1
No. 189 Jalan Tun Razak
50400 Kuala Lumpur
Tel: 21692188 Fax: 27787880
Email: pnglc@mylaw.com.my

Office Hours: 8.30am to 5.45pm
Closed On Saturdays & Sundays

r ref: C9.2010/sf
ur ref: FAZF/C/SP2636/ASWS3/05-im

th May 2012

essrs Farah A.Zabir & Partners
vocates & Solicitors
15, Level 1A, Podium Block
za Perangsang
000 Shah Alam
langor

WITHOUT PREJUDICE
BY FAX No.03-5512 6707 & BY POST

tn: En.Shaik Imran

ear Sirs,

Sale and Purchase Agreement:
Property: Lot 15, Lingkaran Sultan Mohamed 2, Kawasan Perindustrian Bandar Sultan Sulaiman, 42000 Klang, Selangor
Vendor: Astan Shield Warehousing Sdn Bhd
Purchaser: RM Leopad Sdn Bhd

e refer to the above matter and your letter of 17th April 2012.

dly be informed that we are waiting for our client's instructions and will reply your letter herein due course.

anwhile, please confirm if your clients will assign their right to buy the balance of approximately acres of land as part of the purchase consideration to the abovementioned sale and purchase reement.

ank you.

urs faithfully,
ssrs Paul Ong & Associates

client
Attn:Mr.Jega

by f

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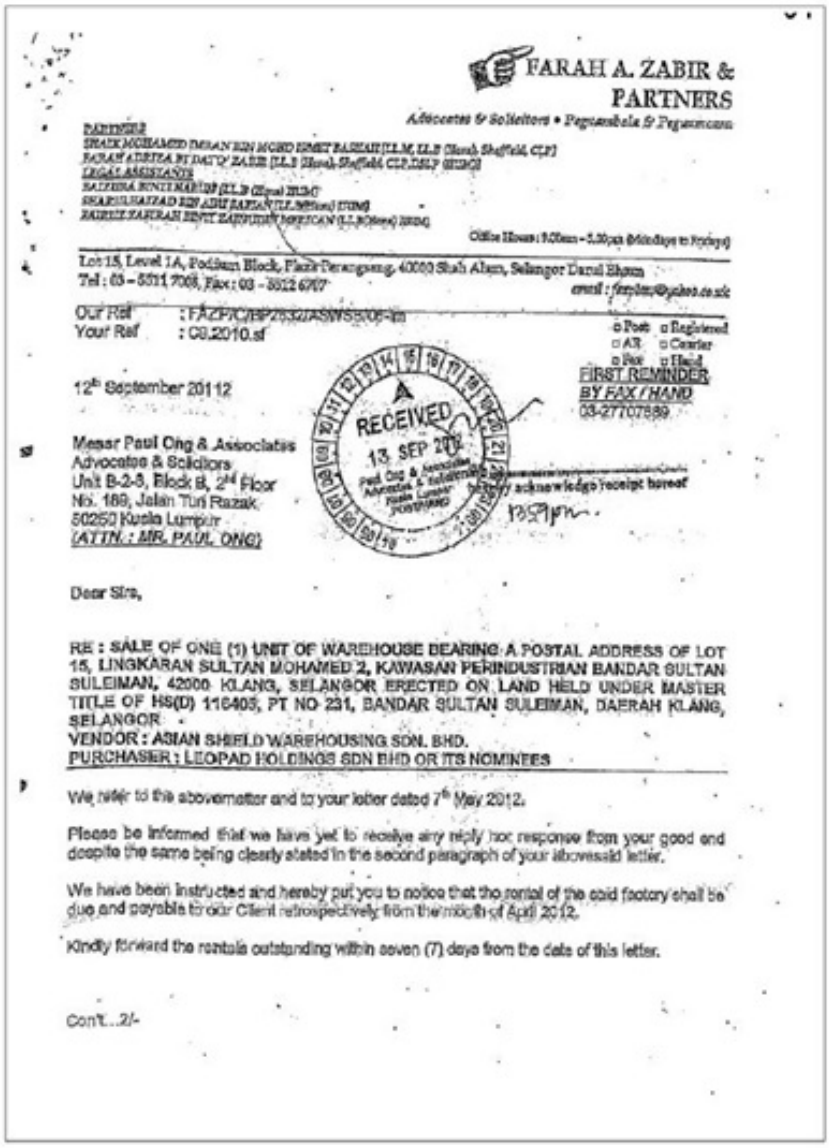
[17] The respondent thus vide its solicitors' letter dated 12 September 2012 gave notice to the appellant that rental for the property will be imposed retrospectively for the appellant's occupation of the property commencing April 2012. It is also gainful to reproduce the aforesaid letter:



FARAH A. ZABIR & PARTNERS

Advocates & Solicitors • Pesuruhjaya & Pegurusumah

PARTNERS
SHAIK MOHAMED IMRAN BIN MOHD ISMET BASHAH [LL.M, LL.B (Hons) Sheffield, CLP]
FARAH ADEENA BT DATO' ZABIR [LL.B (Hons) Sheffield, CLP, DSLP (HONS)]
LEGAL ASSISTANTS
SAZEENA SUNITA MARTIN [LL.B (Hons) IIUM]
SHARULHAYZAD BIN ADLI RAFIAN [LL.B(Hons) IIUM]
FAIRUZ FARHAN BINTI ZAINUDDIN MOKHTAR [LL.B(Hons) IIUM]

Office Hours : 9.00am - 5.30pm (Mondays to Fridays)

Lot 15, Level 1A, Podium Block, Plaza Perangsang, 40000 Shah Alam, Selangor Darul Ehsan
Tel : 03 - 5511 7068, Fax : 03 - 5512 6707 email : farahz@yahoo.co.uk

Our Ref : FAZP/C/BP2832/ASWS505-lm
Your Ref : CS.2010.sf

□ Post □ Registered
□ AR □ Courier
□ Fax □ Hand

FIRST REMINDER
BY FAX / HAND
03-27707889

12th September 2012

RECEIVED
13 SEP 2012
Paul Ong & Associates
Advocates & Solicitors
Kuala Lumpur
PENANG
kindly acknowledge receipt hereof

Messr Paul Ong & Associates
Advocates & Solicitors
Unit B-2-3, Block B, 2nd Floor
No. 189, Jalan Tun Razak
50250 Kuala Lumpur
(ATTN. : MR. PAUL ONG)

Dear Sirs,

RE : SALE OF ONE (1) UNIT OF WAREHOUSE BEARING A POSTAL ADDRESS OF LOT 15, LINGKARAN SULTAN MOHAMED 2, KAWASAN PERINDUSTRIAN BANDAR SULTAN SULEIMAN, 42000 KLANG, SELANGOR ERECTED ON LAND HELD UNDER MASTER TITLE OF HS(D) 116403, PT NO 231, BANDAR SULTAN SULEIMAN, DAERAH KLANG, SELANGOR
VENDOR : ASIAN SHIELD WAREHOUSING SDN. BHD.
PURCHASER : LEOPAD HOLDINGS SDN BHD OR ITS NOMINEES

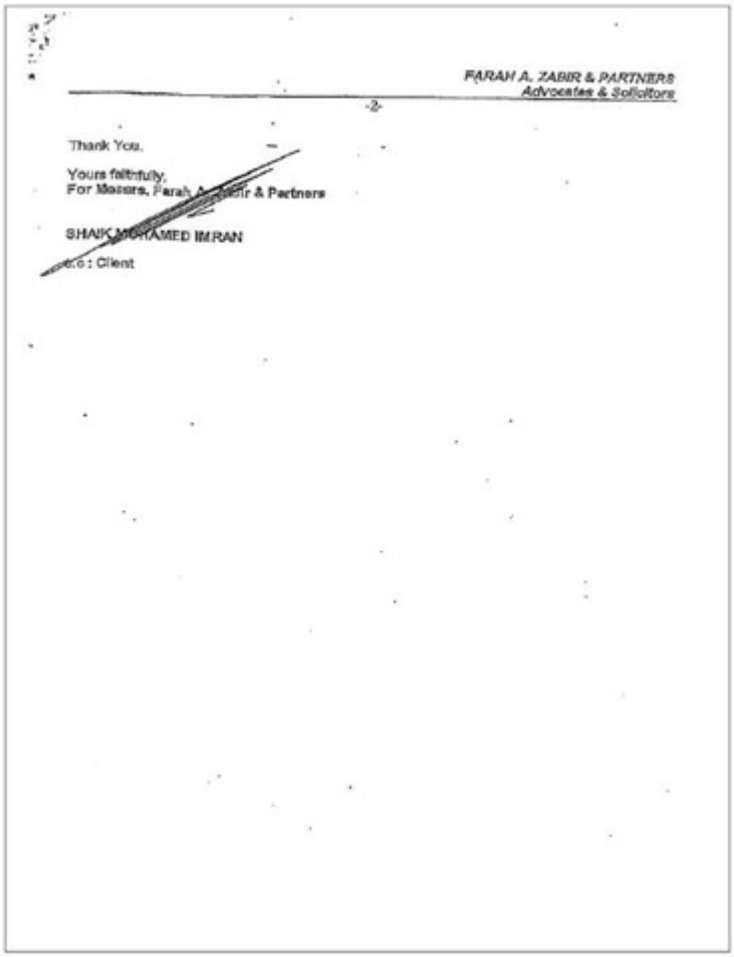
We refer to the abovematter and to your letter dated 7th May 2012.

Please be informed that we have yet to receive any reply nor response from your good end despite the same being clearly stated in the second paragraph of your abovesaid letter.

We have been instructed and hereby put you to notice that the rental of the said factory shall be due and payable to our Client retrospectively from the month of April 2012.

Kindly forward the rentals outstanding within seven (7) days from the date of this letter.

Con't...2/-



FARAH A. ZABIR & PARTNERS
Advocates & Solicitors

-2-

Thank You.

Yours faithfully,
For Messrs. Farah A. Zabir & Partners

SHAIK MOHAMED IMRAN

c.c : Client

[18] Nonetheless the stalemate continued and no sale and purchase agreement has been executed by the parties at all. There was however exchange of correspondences between parties' respective solicitors on allegations of breach of the agreement against each other. In the course of it, the respondent was compulsorily wound up.

[19] Finally, the respondent on 1 November 2016 commenced the suit against the appellant in the High Court ('suit') and claimed for the following:

> 23. Oleh hal yang demikian, Plaintif ingin memohonan untuk suatu penghakiman seperti berikut:
>
> (i) Defendan memberikan milikan kosong ke atas hartanah tersebut di bawah H.S.(D) 116405, P.T. No. 231, Bandar Sultan Suleiman, Daerah Klang Selangor dengan Gudang yang dibina di atasnya dan mempunyai

alamat Lot 15, Lingkaran Sultan Mohamed 2, Kawasan Perindustrian Bandar Sultan Suleiman, 4200 Klang, Selangor Darul Ehsan ('hartanah tersebut') kepada Plaintif dalam tempoh tiga puluh (3) hari dari tarikh penghakiman;

(ii) Defendan membayar kepada Plaintif sewa dan/atau pampasan yang akan ditaksirkan dari 1.3.2010 sehingga April 2012;

(iii) Defendan membayar kepada Plaintif sewa dan/atau sewa berganda yang akan ditaksirkan dari April 2012 sehingga tarikh pemilikan kosong diberikan;

(iv) Secara tambahan, dan/atau alternatif, gantirugi dan/atau pampasan yang akan ditaksirkan dan dibayar oleh Defendan bagi tempoh Defendan menduduki dan menggunakan hartanah tersebut sehingga tarikh pemilikan kosong diberikan;

(v) Defendan membayar cukai tanah, cukai taksiran, utiliti tertunggak dan semua bayaran yang berkenaan hartanah tersebut ketika Defendan mendudukinya iaitu dari 1.3.2010 sehingga tarikh pemilikan kosong diberikan;

(vi) Wang cengkeram sebanyak RM 720,000 yang dibayar oleh Defendan kepaa Plaintif dikontrakan dengan jumlah yang terhutang dalam perenggan-perenggan (ii),(iii),(iv) dan/atau (v);

(vii) Defendan membatalkan kaveat persendirian No. 56224/2010 yang dimasukkan pada 4.11.2010 dan/atau mana-mana kaveat persendirian yang dimasukkan oleh Defendan ke atas hartanah tersebut;

(viii) Defendan dilarang daripada masuk sebarang kaveat selanjutnya ke atas hartanah tersebut;

(ix) Faedah sebanyak 5% ke atas perenggan-perenggan (ii), (iii), (iv) dan/atau (v) dari tarikh masing-masing wujud sehingga tarikh penghakiman;

(x) Faedah sebanyak 5% ke atas perenggan (ii),(iii),(iv) dan/atau (v) dari tarikh penghakiman sehingga tarikh penyelesaian penuh;

(xi) Kos; dan

(xii) Apa-apa perintah atau relif selanjutnya atau lain sebagaimana yang difikirkan adil dan patut oleh Mahkamah yang Mulia ini.

The appellant in response counterclaimed against the respondent for the following:

57. Oleh hal yang demikian, Defendan menuntut balas daripada Plaintif:

57.1 wang sejumlah RM 21,000,000 iaitu kehilangan penggunaan 6.2 ekar daripada Tanah tersebut dan masih berlanjutan sehingga tarikh penghakiman;

57.2 secara tambahan dan/atau secara alternatif gantirugi am untuk ditaksirkan;

57.3 faedah ke atas perenggan 57.1 dan/atau 57.2 di atas pada kadar 5% setahun dari tarikh pemfailan Tuntutan Balas ini sehingga tarikh penyelesaian penuh;

57.4 Kos;

57.5 lain-lain perintah dan/atau relif yang difikirkan adil dan sesuai oleh Mahkamah yang mulia ini.

IN THE HIGH COURT

[20] The appellant initially, amongst other applications, applied to strike out the suit by reason that it was incompetently brought by the respondent without locus standi because the sanction obtained by the wound up respondent is invalid because the applicant, Devi a/p Suppiah ('Devi') who is a contributory is a bankrupt and hence has no locus standi to apply for sanction for the wound up respondent company.

[21] However, the striking out application was dismissed by the High Court and the appeal thereafter was also dismissed by this court as reported in *Asian Shield Warehousing Sdn Bhd v Leopad Holdings Sdn Bhd* [2018] MLJU 1827; [2018] 1 LNS 1981 and *Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd and another appeal* [2021] 2 MLJ 424; [2021] 1 CLJ 328 respectively. Leave was given to appeal to the Federal Court but the appeal in the Federal Court was dismissed without determining the leave questions posed.

[22] Consequently, the suit proceeded to trial and the learned High Court judge found as follows in the judgment dated 22nd January 2020 ('judgment') reported in *Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd* [2020] MLJU 790; [2020] 1 LNS 697 with emphasis added by us:

[4] The plaintiff has, based on the overall evidence, material facts and circumstances, proved that it is the beneficial owner of 4 acres of the subject land with an option to purchase the balance 6 1/2 acres subject to the approval of the relevant authority or authorities. This fact was from the outset within the knowledge of the defendant and was the basis of the understanding between the parties when the original sale and purchase agreement ('SPA') was entered into between them following the plaintiff's letter of offer ('LOO') to the defendant dated 22 October 2010 for the purchase price of RM24 million. The offer was accepted by the defendant upon payment of the agreed deposit of 3% or RM720,000. However, the sale could not be completed due to the plaintiff's inability to secure the option to purchase ('OTP') and the defendant's insistence to purchase the entire 10 1/2 acres.

...

[6] *From the facts, it was indisputable that the defendant had no intention of purchasing the property less the balance 6.25 acres that the relevant state authority eventually refused to sell to the plaintiff who, hence, was no longer in a position to sell the whole property to the defendant. As the SPA between the parties could not for this reason be completed and had effectively come to an end the agreement to allow the defendant to occupy the said property naturally became no longer enforceable. As a result, the continued occupation by*

the defendant of the said property upon issuance of the Plaintiff's notice dated 12 September 2012 could only be considered as a tenant and not as an intended purchaser. Having full knowledge that the SPA could no longer be executed, the defendant's continued occupation without paying any rental for several years would clearly constitute unconscionable conduct and unjust enrichment by the defendant. It was certainly to the detriment of the plaintiff's rights as the beneficial owner of the said property who had been wrongfully deprived of use of his property and compensation for the loss of use over a prolonged period.

[7] As regards the defendant's manifest intention not to proceed with the sale without the balance 6.25 acres of the land, upon the exchange of a series of correspondence between the parties together with their solicitors, the defendant ought to have realised that they will not be able to buy the said property together with the option to purchase the balance of the said land (ie, after the defendant paid the 3% earnest deposit to the plaintiff on 1 March 2010). The defendant should have thereafter demanded the earnest deposit and vacated the said property but the defendant failed or neglected to do so. In effect, the defendant could be considered to have altered its position to carry on with the sale without the option to purchase the balance of the said land. The said non-interest of the defendant in completing the purchase is further evidenced by the fact that until to-date the defendant as the purchaser did not prepare the sale and purchase agreement for the lesser acreage and instead, continued to occupy the said property without paying any rental for 8.5 years. In view of the defendant's and its solicitors' lack of response to the Plaintiff's solicitors' letters in regard to the preparation of the Draft SPA, there was an element of procrastination on the part of the defendant for its own benefit and enrichment, ie, to continue occupation of the land unreasonably without paying any rentals for a prolonged period.

[8] The defendant's position on the purported lapse or termination of the original SPA is this. It was contended that, notwithstanding the grievances the plaintiff may have (which they have created for themselves), the fact of the matter is the plaintiff did not terminate the transaction and neither did they return the earnest deposit of RM720,000 to the defendant. This is crucially important. Without a valid termination, the transaction between the parties is deemed to be still open. It was also stressed that if the plaintiff intends a closure to the transaction they must expressly make it known to the defendant. The plaintiff also has no right to retrain the earnest deposit and unilaterally apply to set off the same towards purported arrears of rental which is being claimed. That would be considered unfair and unconscionable on the plaintiff's part.

[9] However, contrary to the defendant's proposition, *it is crucial to note that the original SPA fell through when it was communicated to the defendant that the plaintiff was unable to secure the consent of the authorities to purchase the balance 6.25 acres and the defendant had evinced an intention not to proceed with the purchase of the land with a lesser acreage than originally offered. There was, thus, no question of the original SPA pending execution. It followed that the agreement for the defendant to occupy the land rent free pending the execution of the SPA had lapsed and was no longer effective. To suggest otherwise for the defendant to continue the occupation without rent for an inordinate period of time when it became clear that the SPA had reached a stalemate would be wrongful and lead to unjust consequences to the defendant.*

...

[13] In resisting the allegation of unjust enrichment against the defendant upon receiving the plaintiff's notice to pay rentals, it was also contended by the defendant that it was evident from the outset that the plaintiff intended to sell 10.25 acres of the said land with the warehouse thereon and the defendant was desirous of purchasing the same. Hence, even though it was subsequently discovered that the plaintiff had beneficial ownership of only 4 acres as alluded to, the contractual obligation was on the plaintiff to secure the entire 10.25 acres for sale to the defendant as agreed to. In any case, that time was never made the essence of the transaction as confirmed by the plaintiff's former directors and solicitor (PW2, PW3 and PW4). In addition, that the defendant had shown a consistent interest to complete the transaction whereas the plaintiff failed to overcome the difficulties in performing its aforementioned obligation ...

...

[22] As to the question of locus standi was only raised in submissions and was a non-issue at the trial where no evidence thereof was led during the trial it cannot now be invoked to defeat the Plaintiff's claim in limine. *It is the same for issues of absolute assignment, no vest order and not having sanction which can be regarded as prejudicial to the plaintiff if these unpleaded issues are considered in determining the outcome of the action.*

...

[30] To summarise, after the termination of the first SPA, there was eventually no concluded SPA between the parties for sale of the subject land or any part thereof. Hence, thereafter, any continued occupation of the plaintiff's property by the defendant without the plaintiff's consent and compensation being paid would be considered unlawful and wrongful. *On the facts and circumstances alluded to, this is a clear case of unjust enrichment by the defendant for occupation without reasonable compensation to the plaintiff. Therefore, upon receipt of the plaintiff's notice dated 12 September 2012, the plaintiff was entitled to be paid compensation and/ or arrears of rental for continued occupation of the property from April 2012 when negotiations for the purchase of the property by the defendant came to an end.*

...

[32] *It was plain in this instance that the present facts did not in any respect support this line of defence as this is a clear case of unjust enrichment at the expense of the plaintiff who faced a predicament in securing a positive response from the authorities in order to complete the sale as agreed owing to circumstances beyond his control. Despite becoming aware that the intended purchase could not be concluded, the defendant continued to occupy the land but refused to pay any rental although the plaintiff made an express demand for rentals.*

[33] In the court's considered view and finding, the plaintiff has on a balance of probabilities proved its claim against the defendant as per paras 19, 20 and 21 of the statement of claim ('SOC') and for unjust enrichment as per para 24 of the same.

[34] Judgment will, accordingly, be entered for the plaintiff as prayed for in para 23, SOC for the following prayers only with variations as below:

A (a) prayer (i) for 4 acres only of the land under the Plaintiff's beneficial ownership within 4 months;

(b) prayer (iii) dismissed due to the absence of any tenancy/ agreement between the parties;

B (c) prayer (ii) RM120,000 from 4/2012–12/2016; and RM165,000 from 01/2017 — up to vacant possession being delivered up;

(d) prayers (v), (vi), (vii) and (viii) as prayed.

(e) prayer (ix) interest at 4% per annum for the items claimed that have been allowed;

C

(f) prayer (x) as prayed in respect of the claims allowed;

(g) prayer (xi) costs in the sum to be fixed by the Court;

(h) prayers (vii) and (viii);

D

(i) prayer (iv): No order;

(j) prayer (v): Subject to deduction of payments already made.

[35] The defendant's counterclaim for the reasons elaborated has not been proved on the applicable standard of proof and is, accordingly, dismissed with costs.

E

[23] The appellant was dissatisfied with the outcome of the suit and thus lodged its appeal on 20 February 2020.

F FINDINGS OF THIS COURT

[24] Before us, the appellant divided its appeal into two stages, viz:

(a) respondent's locus standi in commencing the suit; and

G (b) unjust enrichment benefited by the appellant in not paying rental for the property

We will deal with both of them seriatim.

LOCUS STANDI

H

[25] The appellant primarily re-advanced here its contentions raised in the aforesaid striking out applications as well as after-trial. According to the appellant, there was a new factual narrative as put forth by the respondent during the striking out appeal in the Federal Court that it was the I Director-General of Insolvency ('DGI') himself (and not Devi who sought for sanction) that commenced the suit. As the result, the appeal was found to be unnecessary. However, the appellant only discovered on 14th January 2022 that the aforementioned new factual narrative is wholly inaccurate and erroneous as confirmed by the DGI that it was indeed Devi who sought for

sanction from the DGI. Towards this end, the appellant successfully obtained the order to adduce further evidence of the DGI from this court on 4 October 2022. It is gainful to reproduce the aforesaid letter:

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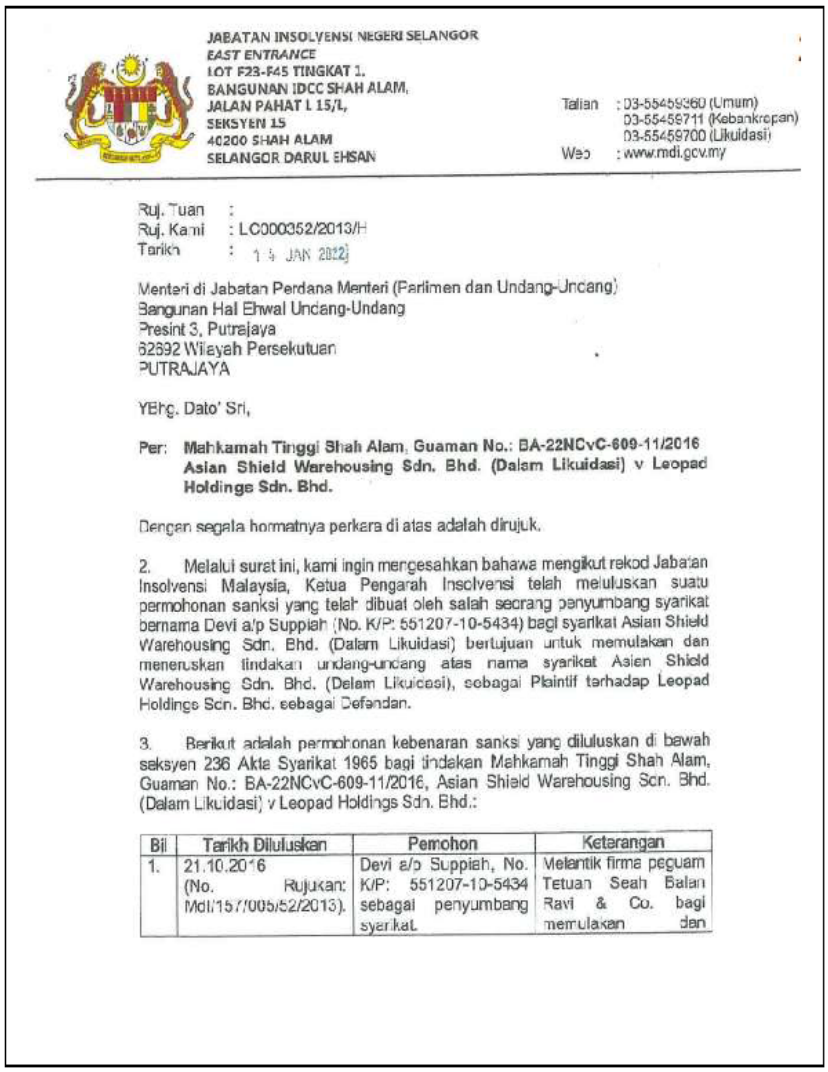

JABATAN INSOLVENSI NEGERI SELANGOR
EAST ENTRANCE
LOT F23-F45 TINGKAT 1,
BANGUNAN IDCC SHAH ALAM,
JALAN PAHAT L 15/1,
SEKSYEN 15
40200 SHAH ALAM
SELANGOR DARUL EHSAN

Telian : 03-55459360 (Umum)
03-55459711 (Kebankrapan)
03-55459700 (Likuidasi)
Web : www.mdi.gov.my

Ruj. Tuan :
Ruj. Kami : LC000352/2013/H
Tarikh : 14 JAN 2022

Menteri di Jabatan Perdana Menteri (Parlimen dan Undang-Undang)
Bangunan Hal Ehwal Undang-Undang
Presint 3, Putrajaya
62892 Wilayah Persekutuan
PUTRAJAYA

YBhg. Dato' Sri,

Per: **Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016**
Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd.

Dengan segala hormatnya perkara di atas adalah dirujuk.

2. Melalui surat ini, kami ingin mengesahkan bahawa mengikut rekod Jabatan Insolvensi Malaysia, Ketua Pengarah Insolvensi telah meluluskan suatu permohonan sanksi yang telah dibuat oleh salah seorang penyumbang syarikat bernama Devi a/p Suppiah (No. K/P: 551207-10-5434) bagi syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) bertujuan untuk memulakan dan meneruskan tindakan undang-undang atas nama syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi), sebagai Plaintif terhadap Leopad Holdings Sdn. Bhd. sebagai Defendan.

3. Berikut adalah permohonan kebenaran sanksi yang diluluskan di bawah seksyen 236 Akta Syarikat 1965 bagi tindakan Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd.:

Bil	Tarikh Diluluskan	Pemohon	Keterangan
1.	21.10.2016 (No. Rujukan: Mdi/157/005/52/2013).	Devi a/p Suppiah, No. K/P: 551207-10-5434 sebagai penyumbang syarikat.	Melantik firma peguam Tetuan Seah Balan Ravi & Co. bagi memulakan dan

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			mereruskan tindakan undang-undang.
2.	15.4.2021 (No. Rujukan: LC000352/2013/H).	Fathiyah binti Abdul Halyum (No. K/P: 850718-10-5938) sebagai penyumbang syarikat.	Melantik firma peguam Tetuan Seah Balan Ravi & Co. bagi membela diri dalam Notis Permohonan bertarikh 12.1.2021 yang difailkan oleh Leopad Holdings Sdn. Bhd. di dalam tindakan di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016.

4. Seterusnya, berikut adalah permohonan kebenaran sanksi yang diluluskan di bawah seksyen 38(1)(a) Akta Kebankrapan 1967 kepada Devi a/p Suppiah (No. K/P: 551207-10-5434) bagi tindakan Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd.:

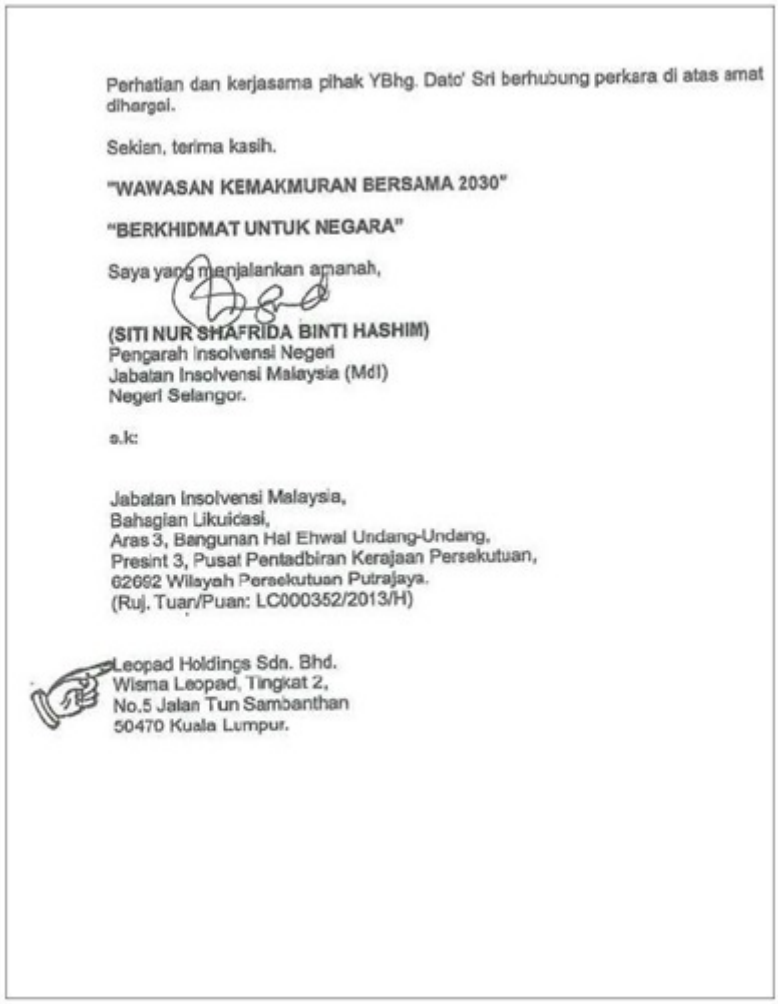
Bil	Tarikh Diluluskan	Pemohon	Keterangan
1.	6.3.2018 (No. Rujukan: BP0000062/2014/381A(6)).	Devi a/p Suppiah, No. K/P: 551207-10-5434.	Kebenaran meneruskan tindakan di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. dengan sanksi yang berkuatkuasa secara retrospektif daripada tarikh 21.10.2016 berdasarkan syarat-syarat yang dinyatakan di dalam surat tersebut.

2.	20.6.2018 (No. Rujukan: BP0000062/2014/ 381A(6)).	Devi a/p Suppiah, No. K/P: 551207-10-5434.	Kebenaran meneruskan tindakan di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. dengan sanksi yang berkuatkuasa secara retrospektif daripada tarikh pemfailan 30.9.2016 berdasarkan syarat-syarat yang dinyatakan di dalam surat tersebut.

5. Selanjutnya, Jabatan Insolvensi Malaysia, Cawangan Selangor juga telah mengeluarkan surat bertarikh 3.8.2021 dan 21.8.2021 kepada Tetuan Bodipalar Ponnudurai De Silva iaitu peguam mewakili Leopad Holdings Sdn. Bhd. di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. berkenaan pengesahan berkenaan kebenaran sanksi yang diberikan kepada Devi a/p Suppiah.

6. Selain itu juga, pertikaian kebenaran sanksi yang diberikan kepada Devi a/p Suppiah bagi kes kebankrapan dan juga sebagai penyumbang Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) di dalam kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. telah diputuskan oleh Mahkamah Persekutuan, Rayuan Sivil No.: 02(i)-2-01/2021(B) melalui perintah bertarikh 26.7.2021 iaitu rayuan (Leopad Holdings Sdn. Bhd.) ditolak dengan kos sebanyak RM70,000.00 kepada Ketua Pengarah Insolvensi tertakluk kepada alokatur.

7. Selanjutnya, kami juga ingin mengesahkan bahawa Jabatan Insolvensi tidak terlibat langsung dengan tindakan kes guaman Mahkamah Tinggi Shah Alam, Guaman No.: BA-22NCvC-609-11/2016, Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) v Leopad Holdings Sdn. Bhd. samada melantik peguam atau dalam memberi arahan kepada peguam atau dalam apa jua perkara berkenaan tindakan guaman di atas bagi pihak Asian Shield Warehousing Sdn. Bhd. (Dalam Likuidasi) atau mana-mana pihak lain.



Perhatian dan kerjasama pihak YBhg. Dato' Sri berhubung perkara di atas amat dihargai.

Sekian, terima kasih.

"WAWASAN KEMAKMURAN BERSAMA 2030"

"BERKHIDMAT UNTUK NEGARA"

Saya yang menjalankan amanah,

(SITI NUR SHAFRIDA BINTI HASHIM)
Pengarah Insolvensi Negeri
Jabatan Insolvensi Malaysia (MdI)
Negeri Selangor.

s.k:

Jabatan Insolvensi Malaysia,
Bahagian Likuidasi,
Aras 3, Bangunan Hal Ehwal Undang-Undang,
Presint 3, Pusat Pentadbiran Kerajaan Persekutuan,
62692 Wilayah Persekutuan Putrajaya.
(Ruj. Tuan/Puan: LC000352/2013/H)

Leopad Holdings Sdn. Bhd.
Wisma Leopad, Tingkat 2,
No.5 Jalan Tun Sambanthan
50470 Kuala Lumpur.

[26] Thus, the appellant re-questioned the locus standi of the respondent because Devi as a bankrupt wrongly applied for sanction from the DGI without revealing her bankruptcy to appoint solicitors to commence the suit as well as that her subsequent applications for sanctions pursuant to the Insolvency Act 1967 were obtained retrospectively. These sanctions are bad for being contrary to statutory as well as common law. As the result, the suit brought by the respondent is incompetent and must fail in limine.

[27] The respondent, in rebuttal, contended that the Federal Court during the striking out appeal found that the questions predicated on incorrect comprehension of law is academic and need not be answered. Thus, the appeal

was dismissed but it was not based on inaccurate and erroneous facts as so asserted by the appellant. According to the respondent, this issue of locus standi here is now caught by the doctrine of res judicata based on the litigation history of the suit.

[28] That notwithstanding, the respondent also contended that all the sanctions sought by Devi from the DGI are properly and validly obtained.

[29] The undisputed background facts are that since the respondent was wound up in 2013, Devi who is herself a bankrupt applied to the DGI on 11 October 2016 as a contributory of the respondent company to appoint Messrs Seah Balan Ravi & Co to bring an action against the appellant in the respondent's name. The sanction was accordingly given via the DGI's letter dated 21 October 2016 to Messrs Seah Balan Ravi & Co pursuant to s 236(2) Companies Act 1965. However, the DGI was then un-informed that Devi is an undischarged bankrupt since 6 December 2013. The letter of the DGI is reproduced below:

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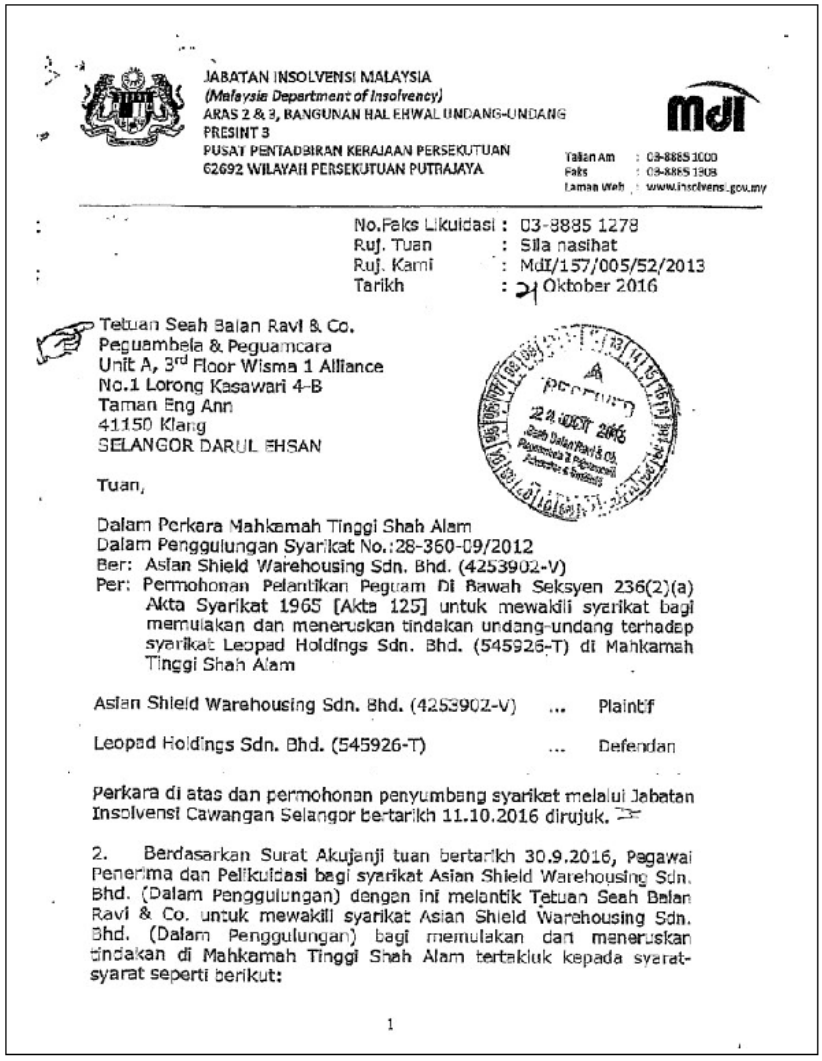

JABATAN INSOLVENSI MALAYSIA
(Malaysia Department of Insolvency)
ARAS 2 & 3, BANGUNAN HAL EHWAL UNDANG-UNDANG
PRESINT 3
PUSAT PENTADBIRAN KERAJAAN PERSEKUTUAN
62692 WILAYAH PERSEKUTUAN PUTRAJAYA

Talian Am : 03-8885 1000
Faks : 03-8885 1908
Laman Web : www.insolvensi.gov.my

No.Faks Likuidasi : 03-8885 1278
Ruj. Tuan : Sila nasihat
Ruj. Kami : MdI/157/005/52/2013
Tarikh : 21 Oktober 2016

Tetuan Seah Balan Ravi & Co.
Peguambela & Peguamcara
Unit A, 3rd Floor Wisma 1 Alliance
No.1 Lorong Kasawari 4-B
Taman Eng Ann
41150 Klang
SELANGOR DARUL EHSAN

Tuan,

Dalam Perkara Mahkamah Tinggi Shah Alam
Dalam Penggulungan Syarikat No.:28-360-09/2012
Ber: Asian Shield Warehousing Sdn. Bhd. (4253902-V)
Per: Permohonan Pelantikan Peguam Di Bawah Seksyen 236(2)(a) Akta Syarikat 1965 [Akta 125] untuk mewakili syarikat bagi memulakan dan meneruskan tindakan undang-undang terhadap syarikat Leopad Holdings Sdn. Bhd. (545926-T) di Mahkamah Tinggi Shah Alam

Asian Shield Warehousing Sdn. Bhd. (4253902-V) ... Plaintif

Leopad Holdings Sdn. Bhd. (545926-T) ... Defendan

Perkara di atas dan permohonan penyumbang syarikat melalui Jabatan Insolvensi Cawangan Selangor bertarikh 11.10.2016 dirujuk.

2. Berdasarkan Surat Akujanji tuan bertarikh 30.9.2016, Pegawai Penerima dan Pelikuidasi bagi syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Penggulungan) dengan ini melantik Tetuan Seah Balan Ravi & Co. untuk mewakili syarikat Asian Shield Warehousing Sdn. Bhd. (Dalam Penggulungan) bagi memulakan dan meneruskan tindakan di Mahkamah Tinggi Shah Alam tertakluk kepada syarat-syarat seperti berikut:

1

A

(a) Tuan hendaklah mendapatkan seorang penjamin yang kompeten dan penjamin tersebut hendaklah menandatangan Akujanji Penjamin dan Bon Jaminan di pejabat **Jabatan Insolvensi Malaysia Cawangan Selangor** dan mendepositkan sejumlah **RM10,000.00 (Ringgit Malaysia Sepuluh Ribu Sahaja)** dalam bentuk draf bank atas nama Ketua Pengarah Insolvensi. (Tuan hendaklah memastikan wang jaminan tersebut telah dibayar kepada Pegawai Penerima dan Pelikuidasi);

B

(b) Pegawai Penerima dan Pelikuidasi atau estet syarikat tidak akan bertanggungjawab dan tidak boleh dipertanggungkan sama sekali atas apa-apa kegagalan, kerugian dan apa-apa kos yang terlibat atau yang dikenakan oleh mana-mana pihak yang terlibat dalam guaman dan/atau yang berbangkit daripada guaman tersebut/kos guaman;

C

(c) Apa-apa kos (sekiranya ada) akan ditanggung sepenuhnya oleh penjamin sebagaimana yang telah dinyatakan dalam Akujanji Penjamin yang bertarikh 4.10.2016;

D

(d) Peguam yang mengendalikan kes hendaklah memaklumkan kepada Pegawai Penerima dan Pelikuidasi perkembangan kes tersebut dari semasa ke semasa secara bertulis; dan

E

(e) Sekiranya keputusan Mahkamah dalam tindakan guaman tersebut memihak kepada syarikat, apa-apa wang, pampasan dan faedah yang diterima oleh syarikat hendaklah diserahkan kepada Pegawai Penerima dan Pelikuidasi untuk dimasukkan ke dalam estet syarikat bagi faedah pemiutang-pemiutang.

Sekian, terima kasih.

F

"BERKHIDMAT UNTUK NEGARA"

Saya yang menurut perintah,

(SHAHRUL RIZAL BIN MAJID)
Pengarah
Bahagian Likuidasi
Putrajaya
b.p. Pegawai Penerima dan Pelikuidasi

G

H

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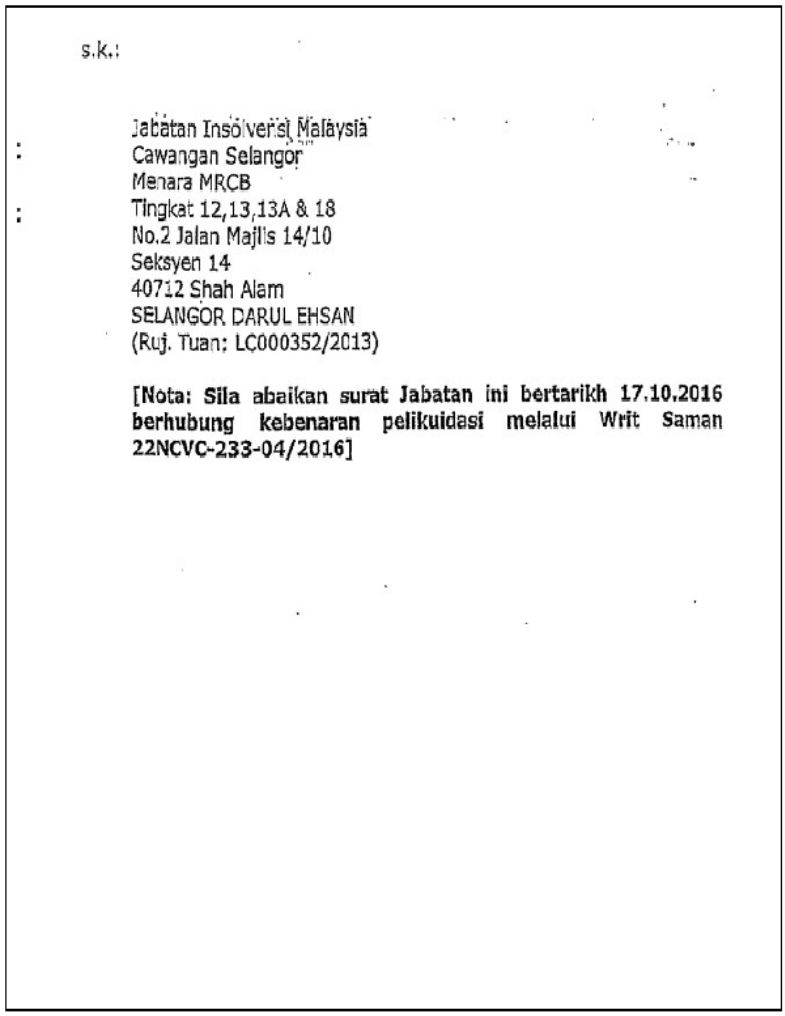

s.k.:

Jabatan Insolvensi Malaysia
Cawangan Selangor
Menara MRCB
Tingkat 12,13,13A & 18
No.2 Jalan Majlis 14/10
Seksyen 14
40712 Shah Alam
SELANGOR DARUL EHSAN
(Ruj. Tuan: LC000352/2013)

[Nota: Sila abaikan surat Jabatan ini bertarikh 17.10.2016 berhubung kebenaran pelikuidasi melalui Writ Saman 22NCVC-233-04/2016]

[30] Consequently, Devi commenced the suit in the name and on behalf of the respondent. She later on 22 February 2018, whilst the suit was already progressing mid-way in the High Court, applied for sanction pursuant to s 38(1)(a) Insolvency Act 1967 and obtained on 6 March 2018 retrospective sanction from the DGI to be effective from 21 October 2016. Nonetheless, she again applied for sanction pursuant to s 38(1)(a) of the Insolvency Act 1967 to the DGI and obtained on 20 June 2018 retrospective sanction from the DGI to be effective from 30 September 2016 instead for the suit.

[31] The relevant law advanced before us are s 216(2) and 236 Companies Act 1965 and ss 438 and 486 Companies Act 2016 as well as s 8(1)(b) and

38(1)(d) Insolvency Act 1967. They read as follows:

216 Companies Act 1965

Contributories in the event of death of member

(1) If a contributory dies, either before or after he has been placed on the list of contributories, his personal representatives shall be liable in due course of administration to contribute to the assets of the company in discharge of his liability and shall be contributories accordingly, and if they make default in paying any money ordered to be paid by them proceedings may be taken for administering the estate of the deceased contributory and for compelling payment thereout of the money due.

Contributories in the case of bankruptcy of member

(2) If a contributory becomes bankrupt or assigns his estate for the benefit of his creditors, either before or after he has been placed on the list of contributories —

(a) his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly; and

(b) there may be proved against his estate the estimated value of his liability to future calls as well as calls already made.

236 General provisions as to liquidators

(1) The liquidator may with the authority either of the Court or of the committee of inspection —

(a) carry on the business of the company so far as is necessary for the beneficial winding up thereof, but the authority shall not be necessary to so carry on the business during the four weeks next after the date of the winding up order;

(b) subject to section 292 pay any class of creditors in full;

(c) make any compromise or arrangement with creditors or persons claiming to be creditors or having or alleging themselves to have any claim, present or future, certain or contingent, ascertained or sounding only in damages against the company, or whereby the company may be rendered liable;

(d) compromise any calls and liabilities to calls, debts and liabilities capable of resulting in debts and any claims, present or future, certain or contingent, ascertained or sounding only in damages subsisting or supposed to subsist between the company and a contributory or other debtor or person apprehending liability to the company, and all questions in any way relating to or affecting the assets or the winding up of the company, on such terms as are agreed, and take any security for the discharge of any such call, debt, liability or claim, and give a complete discharge in respect thereof; and

(e) appoint an advocate to assist him in his duties

(2) The liquidator may —

(a) bring or defend any action or other legal proceeding in the name and on behalf of the company;

(b) compromise any debt due to the company other than calls and liabilities for calls and other than a debt where the amount claimed by the company to be due to it exceeds one thousand five hundred ringgits;

(c) sell the immovable and movable property and things in action of the company by public auction, public tender or private contract with power to transfer the whole thereof to any person or company or to sell the same in parcels;

(d) do all acts and execute in the name and on behalf of the company all deeds, receipts and other documents and for that purpose use when necessary the company's seal;

(e) prove rank and claim in the bankruptcy of any contributory or debtor for any balance against his estate, and receive dividends in the bankruptcy in respect of that balance as a separate debt due from the bankrupt and rateably with the other separate creditors;

(f) draw, accept, make and indorse any bill of exchange or promissory note in the name and on behalf of the company with the same effect with respect to the liability of the company as if the bill or note had been drawn, accepted, made or indorsed by or on behalf of the company in the course of its business;

(g) raise on the security of the assets of the company any money requisite;

(h) take out letters of administration of the estate of any deceased contributory or debtor, and do any other act necessary for obtaining payment of any money due from a contributory or debtor or his estate which cannot be conveniently done in the name of the company, and in all such cases the money due shall for the purposes of enabling the liquidator to take out the letters of administration or recover the money be deemed due to the liquidator himself;

(i) appoint an agent to do any business which the liquidator is unable to do himself; and

(j) do all such other things as are necessary for winding up the affairs of the company and distributing its assets.

(3) The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Companies Act 2016

438 Contributories in the event of bankruptcy

If a contributory becomes bankrupt or assigns his estate for the benefit of his creditors, either before or after the contributory has been placed on the list of contributories-

(a) his trustee shall represent him for all the purposes of the winding up and shall be a contributory accordingly; and

(b) there may be proved against his estate the estimated value of his liability to future calls as well as calls already made.

...

486 Powers in liquidator in winding up by Court

(1) Where a company is being wound up by the Court, the liquidator may —

(a) without the authority under paragraph (b), exercise any of the general powers specified in Part I of the Twelfth Schedule; and

(b) with the authority of the Court or the committee of inspection, exercise any of the powers specified in Part II of the Twelfth Schedule.

(2) The exercise by the liquidator in a winding up by the Court of the powers conferred by this section is subject to the control of the Court and any creditor or contributory may apply to the Court with respect to any exercise or proposed exercise of any of those powers.

Insolvency Act 1967

8 Effect of bankruptcy order

(1) On the making of a bankruptcy order —

(a) except as provided by this Act, no creditor to whom the bankrupt is indebted in respect of any debt provable in bankruptcy shall have any remedy against the property or person of the bankrupt in respect of the debt, or shall proceed with or commence any action or other legal proceeding in respect of such debt unless with the leave of the court and on such terms as the court may impose; and

(b) all the property of the bankrupt shall become divisible among his creditors and shall vest in the Director General of Insolvency and the Director General of Insolvency shall be the receiver, manager, administrator and trustee of all properties of the bankrupt.

38 Duties and disabilities of bankrupts

(1) Where a bankrupt has not obtained his discharge —

(a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Director General of Insolvency;

(b) the bankrupt shall once in every six months render to the Director General of Insolvency an account of all moneys and property which have come to his hands for his own use during the preceding six months, and shall pay and make over to the Director General of Insolvency so much of the same moneys and property as

A have not been expended in the necessary expenses of maintenance of himself and his family;

(ba) notwithstanding paragraph (b), the bankrupt shall immediately report to the Director General of Insolvency the receipt of any moneys, property or proceeds in any form from property the value of which exceeds five hundred ringgit and which moneys, property or proceeds do not form part of his usual income and the bankrupt shall, as soon as may be required by the Director General of Insolvency, pay or make over such moneys, property or proceeds to the Director General of Insolvency;

C (bb) the bankrupt shall immediately inform the Director General of Insolvency if there is any change of his home address;

(c) the bankrupt shall not leave Malaysia without the previous permission of the Director General of Insolvency or of the court;

D (d) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, enter into or carry on any business either alone or in partnership, or become a director of any company or otherwise directly or indirectly take part in the management of any company;

E (e) the bankrupt shall not, except with the previous permission of the Director General of Insolvency or of the court, engage in the management or control of any business carried on by or on behalf of, or be in the employment of, any of the following persons, namely —

(i) his spouse;

F (ii) a lineal ancestor or a lineal descendant of his or a spouse of such ancestor or descendant; or

(iii) a sibling of his or a spouse of such sibling.

G **[32]** First and foremost, we will deal with res judicata raised by the respondent on this issue of locus standi. In this respect, we find there is no conclusive finding either way by the Federal Court on the appeal from this court reported in *Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd and another appeal* [2021] 2 MLJ 424; [2021] 1 CLJ 328 notwithstanding that H the appeal was dismissed. It is not clear whether it was an academic appeal or otherwise.

[33] Be that as it may, we also find that the decisions of the High Court reported in *Asian Shield Warehousing Sdn Bhd v Leopad Holdings Sdn Bhd* [2018] MLJU 1827; [2018] 1 LNS 1981 and of this court that dismissed I the appellant's striking out application and appeal respectively are not final and conclusive on the merits because the suit was not struck out: see *Kluang Wood Products Sdn Bhd & Anor v Hong Leong Finance Bhd & Anor* [1999] 1 MLJ 193 (FC). In other words, this locus standi issue has to be re-determined at trial.

[34] Consequently, we find and hold that res judicata has not been attracted on this locus standi issue. A

[35] Next, we noticed that the learned High Court judge has summarily dismissed this locus standi issue as unpleaded issue in para [22] of his grounds of judgment (see para [22] above). This is in our view arguably a point of law that need not mandatorily be pleaded and we will accordingly deal with it here. B

[36] Upon careful review of the facts, it is plain that Devi as a bankrupt contributory is subject to s 216(2) Companies Act 1965 (now s 438 of the Companies Act 2016) and s 38(1)(a) and/or (d)Insolvency 1967. In *Lai Cheng Ooi (the executrix of the estate of Lee Tain Tshung @ Kee Thien Chiung, deceased) v Naslei Enterprise Sdn Bhd (receivers appointed* [2015] 10 CLJ 409, it was held that the DGI would be the trustee of the bankrupt contributory. C

[37] The critical issue here on locus standi is whether Devi as a bankrupt contributory has been empowered to commence the suit against the appellant by the wound up respondent. D

[38] In this regard, we firstly find that s 216(2) Companies Act 1965 (now s 438 Companies Act 2016) relied upon by the appellant concerns a matter in personam of the bankrupt contributory of needing the DGI to represent the contributory's estate when the contribution of the estate is called upon by creditors in the course of the winding up of the company. This is a red herring and irrelevant to the locus standi issue here. E F

[39] The relevant statutory provisions on the locus standi issue in our view are instead s 236(2)(a) Companies Act 1965 (now s 486(1)(a) Companies Act 2016) and s 38(1)(a) and/or (d) Insolvency Act 1967. In respect of the former, the liquidator is vested with the power without requiring the authority of the court to bring any legal proceedings in the name and on behalf of the wound up company. Nonetheless the liquidator may sanction a contributory to bring the legal proceeding: see *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd (formerly known as Bousted Trading (1985) Sdn Bhd)* [2010] 2 MLJ 749; [2010] 3 CLJ 785 (FC) ('Zaitun Marketing'). As to the latter, the bankrupt contributory shall not in a representative capacity maintain a legal proceeding without the previous sanction of the liquidator or participate in the management of a company without the previous sanction of the liquidator or the court. G H I

[40] Furthermore, in *Winstech Engineering Sdn Bhd v ESPL (M) Sdn Bhd* [2014] 3 MLJ 1 (FC) ('Winstech Engineering'), Mohamed Apandi Ali FCJ held as follows pertaining to an application for sanction to apply for leave to appeal with emphasis added by us:

A [16] From the submissions and arguments before us, it is clear that in making this application, the respondent is relying on the provisions of the Companies Act 1965, while on the other hand, the applicant is relying on the provision of the Bankruptcy Act 1967. It is an obvious and undisputed fact that the applicant is a corporate person incorporated under the Companies Act. That being so, it is axiomatic that
B the applicant cannot be a person under the Bankruptcy Act.

[17] The applicant did not forward any argument as to why despite it being a corporate body the provision of the Bankruptcy Act is applicable for purposes of the pre-requisite sanction before filing any action in court. At the most, the argument was based on analogy. It is our judgment that an analogy argument will have weight
C if it is based on similar facts and similar legal positions but not otherwise.

[18] When a specific law has been enacted pertaining to any power or right relating to legal proceedings, that specific law shall prevail over any other similar laws. It is our judgment that for purposes of this application the relevant law applicable is the Companies Act 1965.

D

[41] As the result, if there is a conflict or uncertainty between the Companies Act and the Bankruptcy/Insolvency Act on a statutory provision pertaining to a winding up matter, the Companies Act prevails.

E

[42] We are therefore secondly of the view that a contributory may ordinarily seek the sanction of the liquidator pursuant to s 236 of the Companies Act 1965 read with *Zaitun Marketing*. However, and since the contributory Devi is a bankrupt, she can only act through her trustee in bankruptcy, ie the DGI
F following the English case of *In re Cape Breton Company* (1881) 19 Ch D 77 where Jessel MR held as follows:

> He is on the list of contributories, it is true, and must remain there; but that does not give him an interest. When a contributory becomes bankrupt his name is not removed from the list but the 77th section of the Companies Act, 1862 (25 & 26
G Vict C89), provides that the trustees in bankruptcy shall represent him, and shall be deemed to be contributories accordingly. He is no longer in any way interested ... The question is one of jurisdiction.

See also *Re Wolverhampton Steel & Iron Co Ltd and others* [1977] 3 All ER 467.

H

[43] Thus, for purposes of bringing the suit, it seems that Devi must seek and obtain the previous sanction from the DGI pursuant to pursuant to s 38(1)(a) and/or (d) of the Insolvency Act 1967 but the law is unclear if this sanction is additional to that required from an ordinary non-bankrupt contributory. It
I seems to us unnecessary since s 236 of the Companies Act 1965 should prevail following *Winstech Engineering*. The failure of a bankrupt to apply for sanction under the Insolvency Act 1967 may in the circumstances perhaps only expose the person to penalties prescribed therein.

[44] Nevertheless, it is clear here that Devi had before the bringing of the suit applied and obtained the sanction of the DGI as if she is an ordinary contributory. Subsequently, she also twice applied for sanction of the DGI pursuant to s 38(1)(a) Insolvency Act 1967 and was retrospectively granted both of them.

[45] That notwithstanding, the parties have also delved into s 38(1)(d) Insolvency Act 1967 on whether Devi's application constituted an attempt to manage the wound up respondent company. If Devi's act involves management of the wound up company, it is crystal clear that prior sanction must be obtained from the DGI. In this regard, we find the dicta of Ahmadi Asnawi JCA in the striking out appeal reported in *Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd and another appeal* [2021] 2 MLJ 424; [2021] 1 CLJ 328 cogent with emphasis added by us:

> [55] *But, if she, in her capacity as a contributory, applies to the liquidator, more so the official liquidator (and not to court) per se for sanction for the plaintiff company's proposed civil action, it cannot be said that she is involved, directly or indirectly in the management of the plaintiff company on account, as alluded to earlier, that once a company is wound up the entire board of directors (including a shadow director for that matter) will cease and become functus officio. And, taking the rider of Ormiston J in Bracht 's case, supra, the said solitary act of the concerned contributory does not amount to directly or indirectly involved in the management of the plaintiff company.*
>
> [56] The entire management and running of the wound up company is now in the hands of the liquidator. She (the bankrupt contributory herein) will only be involved if invited to by the liquidator for certain purposes as provided in the CA, 2016 or take part in the public examination under s 503 of the same. It is beyond imagination to say that such involvement will amount to or will be considered as being directly or indirectly involved in the management of the wound up company.
>
> [57] It must also be noted that once a company is wound up, its entire business ceases immediately except for the beneficial winding up of the company (see Part II, 12th Schedule of the CA, 2016). In the present appeal, it is not even raised that the concerned contributory was an employee or acting as an ex-director of the plaintiff's company when she applied for the said sanction for the plaintiff's company.
>
> [58] The rule restricting the behavior or action or conduct on a bankrupt (disqualifications and disabilities) are meant for the protection of his creditors' interest and those who are dealing with him so as to maintain the commercial morality of his dealings. In this context, it is apposite for us to note briefly the underlying rationale for such disabilities and disqualifications. In *Khoo's Law and Practice of Bankruptcy in Malaysia*, 2nd edn it is observed, inter alia, at p. 1 the following:
>
> > When a person becomes a bankrupt, he obtains protection from legal proceedings by his creditors subject to certain exceptions. However, he is subject to certain disabilities and disqualifications primarily aimed at preventing him from incurring further debts ...
> >
> > The objective of the bankruptcy process is that, since the debtor is unable to

A satisfy all his debts, his assets should be shared fairly and equitably among his creditors ...

In *Tan Wee Hun v Inchape Equatron (M) Sdn Bhd* [1998] 5 CLJ 769 it is further observed:

B The object of the Bankruptcy Act is to protect the public from irresponsible businessmen who transact business when they know they do not have the financial capacity to meet their payment obligations.

[59] Hence, amongst others, a bankrupt is disqualified of being appointed as a company director, and to cease to be a director once declared a bankrupt. To carry C on as a director or to directly or indirectly, be concerned with or takes part in the management of the company is an offence under s 198, of the CA 2016 (see *Asia Commercial Finance (M) Bhd v Pasadena Properties Development & Ors* [1990] 2 CLJ 961; [1990] 1 CLJ Rep 606).

[60] The above-mentioned activities presuppose that the company the concerned D contributory is said to have directly or indirectly taken part in its management must of necessity be a going concern or a solvent company. Here is where *Commissioner for Corporate Affairs v Bracht* is directly on point. The case is pointedly all about a going concern company or a solvent company. So too in all the cases cited by the defendant where the act of the bankrupt was questioned and impugned.

E [61] *We would reiterate that even though the concerned contributory is undisputedly an undischarged bankrupt, reading s 38(1)(d) in the context of its setting, inter alia, Part II of the BA/SA, 1967, the company in which the concerned contributory is said to be directly or indirectly concerned in or take part in its management must refer to a going concern or a solvent company. Hence, the status of the plaintiff's company as a wound up* F *company is material and having serious determinative implication on the issue raised by the defendant. It is worth repeating that once a company is wound up, the management, ie, the entire board of directors, is functus officio, and the same being taken over by the liquidator. Henceforth, the winding up company is prohibited from carrying out any business except for the beneficial winding up of the company.*

G [62] *Thus, there is no basis to sustain the defendant's contention that the concerned contributory has no locus to apply for sanction for the plaintiff's company. Further, it must be noted that the concerned contributory is not affirming an affidavit nor holding herself out as a director or officer of the company in any affidavit or cause papers to support the plaintiff company's action in court. Thus, the cases cited by learned counsel for the appellant are readily distinguishable.*

H [63] In the light of the circumstances under which the said sanction was applied by the concerned contributory, the view of the learned trial judge as expounded in para 10 of his grounds of judgment (at p 23, RRT) is entirely correct. *There is no issue that the contributory has no competency to apply for the said sanction. She has the competency and she does not have to obtain the prior sanction of the DGI or previous sanction of the* I *DGI. On the facts and law, she had passed the legal threshold to procure the said sanction. The action was proceeded upon a valid sanction.*

[46] We agree with the views of this court therein which suggest that sanction of the DGI by reason of Devi's bankruptcy is not even necessary

because the acts of instructing solicitor and bringing an action of debt recovery by Devi is consistent with winding up that did not constitute management of the wound up company. It was not to condone Devi entering into business on behalf of the wound up company as cautioned in *Foo Fatt Chuen v Jacobson Cheong Weng Hin & Ors* [2012] 8 MLJ 522; [2012] 3 CLJ 632. Accordingly, the retrospective sanctions sought by Devi pursuant to s 38(1) of the Insolvency Act 1967 can be treated as done abundans cautela.

[47] In the premises, we objectively find and hold thirdly that the sanction which was originally sought by Devi and obtained from the DGI dated 21 October 2016 suffices notwithstanding it was not so stated in the application for purposes of s 38(1)(a) or (d) of the Insolvency Act 1967 hence the DGI might have been unaware of Devi's bankruptcy. These omissions are also in our view not of material significance and consequence because it is the same liquidator ie the DGI who was the person who gave the sanction. Moreover, we find that the wide safeguard conditions already imposed by the DGI on the giving of the original sanction on 21 October 2016 are adequate to account for Devi's bankruptcy at that material time.

[48] We are fourthly therefore of the view that it is unnecessary for Devi to make an application to seek sanction of the DGI to bring an action pursuant to s 236 of the Companies Act 1965 read with *Zaitun Marketing* coupled with another application pursuant to s 38(1)(a) and/or (d) of the Insolvency Act 1967. The sanction obtained on 21 October 2016 which has undoubtedly been obtained prior to the commencement of the suit suffices. Consequently, the other two retrospective sanctions obtained by her are surplusages and did not matter that they were not prior or previous sanctions. It follows that the cases of *Hup Lee Coachbuilders Holdings Sdn Bhd v Cycle & Carriage Bintang Bhd* [2013] 1 MLJ 406; [2012] 10 CLJ 88 (CA), *Akira Sales & Services (M) Sdn Bhd v Nadiah Zee bt Abdullah and another appeal* [2018] 2 MLJ 537 (FC) and *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614; [2020] 9 CLJ 449 (FC) on invalidity of subsequent/retrospective sanctions are hence immaterial. We are mindful of the case of *Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case* [2022] 12 MLJ 247 (CA) which has been recently affirmed by this court, but we find that the case is distinguishable because it concerned delegation of the liquidator's power which is not in issue herein.

[49] In the premises, we find and hold that the respondent has locus standi to bring and maintain the suit. In other words, the suit has not been incompetently brought contrary to that advanced by the appellant.

A SUBSTANTIVE MERITS

[50] The appellant principally contended before us that the learned High Court judge fell into error by having failed to consider that the agreement subsisted until it was terminated. According to the appellant, the agreement was only terminated upon the commencement of the suit. Prior thereto, the agreement remained in force and binding on the parties. Thus, the appellant was not obliged to pay the respondent rental for the property.

[51] However, the respondent cross contended that the appellant must pay rental for the property upon the service of the respondent's solicitor's letter dated 12th September 2012.

[52] We see in paras [6], [9] and [30] of the learned High Court judge's grounds of decision (see para [22] above) that His Lordship accepted the respondent's contention.

[53] The law on appellate intervention particularly to vary a trial decision has been set out in *Perembun (M) Sdn Bhd v Conlay Construction Sdn Bhd* [2012] 4 MLJ 149; [2012] 1 LNS 1416 (CA) wherein Abdul Wahab Patail JCA held as follows with emphasis added by us:

> [4] Both parties began their submissions with the clear understanding that an appellate court will be slow to interfere with the findings of facts and judicial appreciation of the facts in the trial judge. They cited this court in *Sivalingam Periasamy v Periasamy & Anor* [1995] 3 MLJ 395; [1996] 4 CLJ 545 (CA). This general principle was adopted by this court in *Lee Ing Chin & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97; [2003] 2 CLJ 19 and other cases. It is clear it is a general principle and that there are exceptions when appellate intervention is necessary to ensure justice is done. In the cases regularly cited, the terms 'intervene' and 'interfere' are used interchangeably. A more precise use of terminology would remove much unnecessary confusion and argument. It is more precise to say that an appellate court will intervene to correct an injustice when it is shown to have occurred in the trial court, but it would be an interference otherwise.
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> ...
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> [7] There is almost no limit to the range within which cases in court may vary. At one end there are cases that involve solely questions of law, and no facts are disputed. On the other there are cases that involve no law but all the facts are disputed. Within these cases there may be cases with disputed facts that involve solely interpretation and inferences leading to a conclusion on a finding on the disputed fact, and there may be other cases with disputed facts that involve solely oral evidence and the finding depends entirely upon an assessment of the credibility of witnesses who testified and were tested before the trial judge.
>
> [8] *Hence, the proper approach is that if (a) it is shown that the judgment cannot be explained or justified by the special advantage enjoyed by the trial judge by reason of having seen and heard the witnesses testify and being tested before him, and (b) an*

injustice is demonstrated to have been occasioned by any error by the trial judge, for example:

(a) the judgment is based upon a wrong premise of fact or of law;

(b) there was insufficient judicial appreciation by the trial judge of the evidence of circumstances placed before him;

(c) the trial judge has completely overlooked the inherent probabilities of the case;

(d) that the course or events affirmed by the trial judge could not have occurred;

(e) *the trial judge had made an unwarranted deduction based on faulty judicial reasoning from admitted or established facts; or*

(f) *the trial judge had so fundamentally misdirected himself that one may safely say that no reasonable court which had properly directed itself and asked the correct questions would have arrived at the same conclusion;*

an appellate court will intervene to rectify that error so that injustice is not occasioned.

[54] Furthermore, in *Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC), Steve Shim CJ (Sabah and Sarawak) held as follows with emphasis added by us:

In gist, the pivotal question raised by the appellants was whether the term 'insufficient judicial appreciation of the evidence' used by the Court of Appeal constituted a new test for appellate intervention. We think it is important to examine this proposition in the light of what the Court of Appeal had said in its judgment beginning from para 27 which we have reproduced earlier but repeated herein for the purpose of emphasis. It states:

> Suffice to say that we re-affirm the proposition that an appellate court will not, generally speaking, intervene unless the trial court is shown to be plainly wrong in arriving at its conclusion. But appellate interference will take place in cases where there has been no or insufficient judicial appreciation of the evidence. It is, we think, appropriate that we say what judicial appreciation of evidence involves.

And the Court of Appeal went on to explain in para. 28 as follows:

> *A judge who is required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. He must, when deciding whether to accept or to reject the evidence of a witness test it against relevant criteria.* He must also test the evidence of a particular witness against the probabilities of the case.

In making the observations above, the Court of Appeal cited the following cases: *Tindok Besar Estate Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119; *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257; [1966] 1 LNS 110; *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 2 CLJ 153; *Yusoff bin*

Kassim v Public Prosecutor [1992] 3 CLJ 1535; [1992] 1 CLJ Rep 376; *Rex v Low Toh Cheng* [1941] 1 MLJ 1; *Tengku Mahmood v Public Prosecutor* [1974] 1 MLJ 110; [1974] 1 LNS 176; *Choo Kok Beng v Choo Kok Hoe & Ors* [1984] 2 MLJ 165; [1984] 1 LNS 40; *Armagas Ltd v Mundogas SA ('The Ocean Frost')* [1985] 1 LR 1 *State of Rajasthan v Hanuman* AIR 2001 SC 282, 284; *Tek Chand v Dile Ram* AIR 2001 SC 905.

In our view, the Court of Appeal in citing these cases had clearly borne in mind the central feature of appellate intervention ie, to determine whether or not the trial court had arrived at its decision or finding correctly on the basis of the relevant law and/or the established evidence. In so doing, the Court of Appeal was perfectly entitled to examine the process of evaluation of the evidence by the trial court. Clearly, the phrase 'insufficient judicial appreciation of evidence' merely related to such a process. This is reflected in the Court of Appeal's restatement that a judge who was required to adjudicate upon a dispute must arrive at his decision on an issue of fact by assessing, weighing and, for good reasons, either accepting or rejecting the whole or any part of the evidence placed before him. The Court of Appeal further reiterated the principle central to appellate intervention ie, that a decision arrived at by a trial court without judicial appreciation of the evidence might be set aside on appeal. This is consistent with the established plainly wrong test.

In the circumstances and for the reasons stated, there is no merit in the appellants' contention that the Court of Appeal had adopted a new test for appellate intervention. In our view, what the Court of Appeal had done was merely to accentuate the established plainly wrong test consistently applied by the appellate courts in this country.

[55] From our review and analysis of the facts chronologically, there is no doubt that there was the agreement made between the parties. It is a binding preliminary contract pending the execution of the sale and purchase agreement of the land.

[56] It is also plain from the agreement that the appellant is entitled to the occupation of the property rent-free throughout the subsistence of the agreement.

[57] However, it became obvious in 2011 that the respondent was unable to fulfil the agreement due to its inability to procure the larger plot of the land from PNSB to be sold to the appellant under the agreement. There were attempts made between the parties to vary the agreement but to no fruition.

[58] Thus, the respondent finally on 12 September 2012 via its solicitors served its notice on the appellant requiring payment of rental for the property.

[59] From our construction of the aforesaid letter, we find, for all intents and purposes, termination of the agreement was contemplated. The respondent demanded from the appellant for payment of rental of the property to be

calculated retrospectively from April 2012 which would not have been payable had the agreement subsisted. It is also plain that the respondent has by that time disabled itself from completing the agreement through the execution of a sale and purchase agreement for the complete sale of 10.2 acres of the land. Consequently, we noted that the agreement was meant to be terminated on 12 September 2012 by the respondent.

[60] The law on termination of contracts in analogous circumstances here of disability of performance has been succinctly encapsulated in the dicta of Augustine Paul FCJ in *Akitek Tenggara Sdn Bhd v Mid Valley City Sdn Bhd* [2007] 5 MLJ 697 (FC) as follows with emphasis added by us:

> [30] ... In commenting on the circumstances in which a person may disable himself from performing his promise within the meaning of s 39 of the Indian Contracts Act (equivalent to our s 40) *Indian Contract and Specific Relief Acts* by Pollock & Mulla, 11th ED, Vol 1 says at p 532:
>
> > The principle that in the absence of an express provision in a contract to the contrary it was not to be presumed that the parties intended that a party should be entitled to take advantage of his own breach as against the other party was not limited to cases where a party was relying on his own wrong to avoid his obligations under the contract but applied also where a party sought to obtain a benefit under a continuing contract on account of his breach (*Alghussein Establishment v Eton College* [1991] 1 All ER 267.
> >
> > It is very old law that if a promisor disables himself from performance, even before the time for performance has arrived, it is equivalent to a breach...
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> ...
>
> [31] ... *The relevant words in s 40, that is to say, '... disabled himself from performing his promise ...' do not subject the rule to such a qualification. The words are wide enough to include any act on the part of a party which has the effect of bringing the contract to an end.* There can be no dispute that the defendant terminated the services of the plaintiff because its new majority shareholder wanted to appoint its own architect. The use of the new plans resulting in the project being aborted, even if considered to be a reason, is on the same footing. This state of affairs was brought about by the act of the defendant itself thereby disabling it from performing its part of the agreement. The defendant cannot disable itself from performing a contract brought about by its own acts. The reason for the termination of the services of the plaintiff by the defendant is thus not valid. There is therefore a constructive breach of contract by the defendant. What now remains to be considered is the measure of damages to which the plaintiff is entitled.
>
> [32] *Where a party by his own act makes it impossible for him to perform his contract at the due date, there is a constructive breach of contract, and the other party is entitled forthwith to enforce his rights as on a breach* (see *Synge v Synge* [1894] 1 QB 466 *Saranpet v Punno* [1931] 134 IC 779). The measure of damages following a breach of contract is governed by s 74 of the Contracts Act 1950 ('s 74') ...

[61] However, the appellant, instead of accepting the constructive repudiatory breach by the respondent and discharge the agreement, unilaterally chose to affirm and treat the agreement as still subsisting and continued to occupy the property without paying rent. As a matter of law, the appellant in so doing retained its right to sue the respondent for damages following *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447.

[62] The respondent however did not refund the initial deposit paid by the appellant. Furthermore, the respondent did not unequivocally reject the appellant's affirmation by seeking vacant possession of the property forthwith.

[63] Finally, the respondent broke the impasse by commencing the suit in 2016 primarily to seek vacant possession of the property as well as claimed for unjust enrichment on the part of the appellant in not paying rental for the property as demanded by the respondent. These remedies, amongst others, were allowed by the learned High Court judge.

[64] The appellant in turn counterclaimed damages in the suit against the respondent for breach of the agreement based on the facts as pleaded but that was dismissed by the learned High Court judge as unproved.

[65] In the premises, we find that the agreement was only terminated forthwith upon the commencement of the suit on 1 November 2016 following *Tan Hock Chan v Kho Teck Seng* [1980] 1 MLJ 308 (FC).

[66] In respect of prayer (i) of the respondent's claim for vacant possession, the learned High Court judge allowed it for the 4 acres portion of the land. We find no appealable error there and this does not appear to be disputed by the appellant.

[67] Next as to prayer (ii) of the respondent's claim for rental of the property, the learned High Court judge allowed rent of RM120,000/month from April 2012 to December 2016 and thereafter RM165,000/month from January 2017 until vacant possession of the 4 acres portion of the land is delivered up to the respondent based on unjust enrichment that benefitted the appellant.

[68] Before us, it is plain that the appellant did not dispute that rental for the property is payable after the Agreement is terminated save that the termination only took place upon the commencement of the suit.

[69] Based on our finding in para [65] above, we find that the payment of rent for the property should commence from 1 November 2016 instead of

April 2012 as ordered by the learned High Court judge. In either case, we are also satisfied that the respondent has on the facts here satisfactorily met the tenets of unjust enrichment set out in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441 (FC). Put simply, the appellant has since the termination of the agreement been enriched by the occupation of the property at the expense of the respondent without payment of rent and there is no defence thereto. We are mindful of the appellant's counterclaim for damages due to the respondent's wrongful repudiation of the agreement but we find that is an independent cross claim which will be dealt separately as a matter of accounting rather than a defence to extinguish liability to make restitution.

[70] Consequently, we find that the appellant is liable to pay rent for the 4 acres portion of the land including the property situated thereon from 1 November 2016 till vacant possession is delivered.

[71] As for the quantum of rent payable, we noticed that both parties produced expert witnesses on property valuation to opine on the fair rent payable for the property. The respondent relied on Hoa Chee Guan of Mohd Nor & Partners who assessed the rent at RM127,490/month as on 1 March 2010 and between RM164,346/month to RM190,984/month as at end 2017 whereas the appellant relied on Anthony Chua of KGV International property Consultants who assessed the rent at RM87,000/month for 2010 compounding to RM108,000/month for 2018. The learned High Court judge did not accept either of the rent assessed by the parties' respective expert witnesses but adopted a fair rent pro-rated therefrom.

[72] We are of the view that the approach adopted by the learned High Court judge is arbitrary and hence warrants appellate intervention here.

[73] Next, the learned High Court judge dismissed prayer (iii) of the respondent's claim for double rent but this is irrelevant here because there is no separate appeal on this by the respondent.

[74] Moving on, the learned High Court judge made no order on prayer (iv) of the respondent's claim for damages but this is again irrelevant here because there is no separate appeal on this by the respondent too.

[75] In respect of prayer (v) of the respondent's claim for quit rent, assessment, utilities and other charges on the land ('charges'), the learned High Court judge allowed the same to be paid by the appellant from 1 March 2010 until vacant possession has been delivered. Upon our perusal of the agreement, it seems that this charges are payable by the appellant in consideration of the appellant utilising the property fee of rent throughout the subsistence of the agreement. This would not be the case upon termination of the agreement.

Consequently, we find that the learned High Court judge erred when he ordered that these charges be still paid by the appellant after the termination of the agreement and appellate intervention is justified as well.

[76] As to prayer (vi) of the respondent's claim for contra of the initial deposit paid by the appellant against the respondent's claims, this has been allowed by the learned High Court judge. Upon our review, this is correct as a matter of accounting alluded to in para [69] above. Thus, there is no appealable error here that warrants intervention.

[77] With regard to prayers (vii) and (viii) of the respondent's claim on removal of private caveat entered on the land by the appellant as well as prevention of further entry of private caveat by the appellant respectively which have been allowed by the learned High Court judge, we noticed that the caveat was still in subsistence at the material time of the filing of the suit. Hence upon review, we find that there is no appealable error on the part of the learned High Court judge. It is immaterial if the caveat lapsed during the course of the trial of the suit. Furthermore, there is no prejudice that the appellant be prevented from further entry of the private caveat since the Agreement has been terminated and the appellant has no longer any caveatable interest in the land.

[78] As for the counterclaim of the appellant for loss of use of the 6.2 acres of the land that has been dismissed, we find that the learned High Court judge concluded that this has not been proved. Since we have found in paras [59] to [61] above that the respondent has terminated the agreement on 1 November 2016 due to its own disability to honour it in entirety that included the 6.2 acres portion of the land was a constructive repudiatory breach of contract, the appellant is entitled to damages as proved.

[79] We however concur with the learned High Court judge that the appellant failed to do so by only having its director Dato' Loganathan a/l Ramamirtham making the following bald assertion at trial:

> As a result of the Plaintiff's breach in resolving the matter whereby the defendant was supposed to have been able to use the entire 10.25 acres, we have incurred losses amounting to approximately RM250,000 a month as opportunity loss since we have not been able to utilise the remaining 6.25 acres.

[80] The is no documentary evidence adduced by the appellant to substantiate that estimated loss which would normally be expected and available in such commercial undertakings: see *Oakwell Engineering International Pte Ltd v PCM Feam (M) Sdn Bhd* [2014] 11 MLJ 175.

[81] In the premises, we find no appealable error that warrants appellate intervention.

CONCLUSION

[82] For the foregoing reasons, particularly in paras [72] and [75] above, we partly allow the appellant's appeal by varying the High Court judgment and order as follows:

(a) the date 4/2012 in prayers (ii) and (viii) of the judgment is substituted to 01/11/2016;

(b) furthermore, the rent of RM120,000 and RM165,000 in prayers (ii) and (iii) of the judgment is set aside and the compensable rent by the appellant to the respondent be re-assessed by the High Court with the assistance of a sole court appointed expert valuer to be agreed by the parties, otherwise appointed by the President of the Royal Institution of Surveyors Malaysia, whose fees shall be jointly paid by the parties;

(c) the charges in prayer (iv) of the judgment is substituted from 1 March 2010 to 1st November 2016 only to be re-assessed by the High Court; and

(d) the parties shall bear their own costs here including for the re-assessment to be conducted pursuant to (ii) and (iii) above.

[83] For the avoidance of doubt, the rest of the unvaried part of the High Court judgment and order stands enforceable.

Appeal allowed in part.

Reported by Dzulqarnain Ab Fatar